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Robin West

Georgetown University Law Center, west@law.georgetown.edu

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Hobby Lobby, Birth Control and Our ongoing Cultural Wars: Pleasure and Desire in the Crossfires

Birth control has re-emerged as a political, legal and constitutional conundrum – maybe obsession – echoing its first such emergence fifty years ago, in the middle of the 1960s. Underlying the legal battles culminating in the *Hobby Lobby*¹ decision from last term, is a “culture war” that features familiar antagonisms – antagonisms that some of us might have thought – wrongly -- had abated – that first rose to constitutional prominence in *Griswold v Connecticut*² and *Eisenstadt v Baird*,³ in 1965 and 1972 respectively. The parallels are striking. Thus, today, as then, social conservatives assert a religious or moral commitment to a traditional understanding of the nexus between marriage, sexuality and child-raising, and fear that birth control technologies threaten that nexus, while women seeking enhancement of their health and control over their fertility, as well as couples and individuals seeking sexual expression freed of the anxieties of conception and pregnancy, find birth control both fully adequate, and necessary, to the fulfillment of both ends. Today, as then, one side or the other in this cultural war first uses ordinary law to protect or reflect their interests: then, opponents sought to ban the use of birth control through state laws criminalizing its prescription or use,⁴ and

¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

² *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁴ The statutes at issue in *Griswold* were CONN. GEN. STAT. §§ 53-32 and 54-196 (1958 rev.).

Section 53-32 says: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.”

Section 54-196 says: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

The statute at issue in *Eisenstadt* was MASS. GEN. LAWS ANN. ch. 272 § 21.

Section 21 says “whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception,” will receive a maximum five-year term of imprisonment, except as authorized in § 21A. Under § 21A, “[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or

today, proponents seek to guarantee its accessibility through mandating its coverage in insurance policies provided by employers, as required by the Affordable Care Act.⁵ And, today, as then, the antagonists burdened by these ordinary laws then seek the protection of the Courts, who in turn employ some “higher” source of law to protect their interests, beliefs, or liberties from the lower law that threatens them: then, would-be birth control users and prescribers implored the Court to apply the Constitution and its privacy-protecting penumbras to protect them against the effect of state laws that had criminalized their prescription and use; today, religious objectors prod the Court to invoke the protection of the twenty-five year old Religious Freedom Restoration Act⁶ -- itself enacted to codify into law a discarded understanding of the First Amendment’s protection of religious liberty⁷ -- against the impact of the newly enacted Affordable Care Act, arguing that the cooperation in the distribution of birth control to their employees required of them by the Act would embroil them in complicity with a grave sin, and thus burden their religious practice. And of course, then as now, the Supreme Court stepped in and settled the legal dispute: then, by finding a constitutional right to use birth control in the privacy-enhancing penumbra of various constitutional guarantees,⁸ and now, by finding a legal right, grounded in the Religious Freedom Restoration Act, for religiously motivated employers to opt out of the offending regulations promulgated pursuant to the Affordable Care Act, which otherwise require employers to provide insurance that covers the provision of birth control to their employees.⁹

There is, though, a major difference between the cultural, legal and constitutional wars around birth control of the nineteen-sixties and our contemporary birth control wars, which has gone relatively unnoticed at least in the legal literature, beyond the reversal of the lineup of the sides looking to deploy a higher law – either the law emanating from constitutional penumbras, or broad interpretations of the quasi-constitutional Religious Freedom Restoration Act -- so as to control the impact of ordinary law that impinges on beliefs or freedoms. Then, at least by the end of that decade, the two major sides to the birth control wars as they played out in the courts had converged on a shared understanding of what I will refer to as the “social meaning,” or *point*, of birth control; where they differed, of course, was over its value. But they more or less agreed on what birth control *is*. For both groups, birth control was understood to be a group of technologies that would artificially prevent or interrupt conception, *and which*, by so doing, would allow women to control their own fertility, and would allow heterosexual men and

articles to any married person presenting a prescription from a registered physician.” *Eisenstadt v. Baird*, 405 U.S. 438, 440-441 (1972).

⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 2010 U.S.C.C.A.N. (124 Stat.) 892.

⁶ Religious Freedom Restoration Act of 1993, 42 U. S. C. §2000bb et seq.

⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-61 (2014); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–2000bb-1.

⁸ *Griswold*, 381 U.S. at 485-86; *Eisenstadt*, 405 U.S. at 453-455.

⁹ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759.

women to enjoy a sexual liberty unconstrained by anxiety or fears of conception.¹⁰ It would do other things as well. It would, for example, enhance the health of some women, particularly those who had already had multiple pregnancies, and for whom an additional pregnancy might be dangerous or life threatening.¹¹ And, it would facilitate some degree of “family planning” by married couples seeking to control the spacing and size of their families.¹² But all participants in those earlier birth control wars concurred that birth control, and particularly the newly invented and highly effective pill, would primarily allow women, whether married or not, much greater control of fertility, and would permit all heterosexuals much greater sexual liberty. For some would-be users, the enhancement of women’s control over fertility was what was central, and for others, it was the freer sex. And, for some moral and religious objectors, the prospect of individual control of fertility is what was grievous – marital sex should always be open to the conception of life, or at least to the risk of it, and to try to reduce that risk to zero is sinful – while for others, the enhancement of sexual freedom was what was most objectionable – sex unburdened by the possibility of conception is a form of immoral and intolerable licentiousness, accompanied by a host of social harms. But all sides agreed that birth control promised two central things -- control of fertility and sexual liberty -- and that the promises were linked: control of fertility, and the freedom from anxiety over reproduction, would as a consequence promote greater sexual liberty. This set of promises is what I’m referring to as birth control’s “social meaning,” and it was that agreed social meaning that eventually informed the Court’s decisions regarding constitutional issues surrounding its use.

That social meaning, and certainly the consensus around it, has virtually disappeared from our current legal debates about access to birth control, and the existence or scope of claimed exemptions from various duties to provide insurance that covers it. We hear virtually no mention of it, either in the *Hobby Lobby* decision itself or in our debates regarding it. The majority opinion in *Hobby Lobby* makes no mention whatsoever of either the control of fertility or the liberation of sexual expression as intrinsic to the point of birth control, and even Justice Ginsburg’s dissent contains only one brief reference to the control of fertility, and the importance of that control to women’s equality,¹³ and no references at all to sexual expression, as part of birth control’s value. She focused instead, as did both the ACA

¹⁰ For a thorough legal history of the movement toward constitutionalizing a right to use birth control, See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (Berkeley: University of California Press, 1998). For a social and political history of the movement for access to birth control, see LINDA P. GORDON, *WOMAN’S BODY, WOMAN’S RIGHT: BIRTH CONTROL IN AMERICA* (New York: Penguin Books, 1990) updated in LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF THE POLITICS OF BIRTH CONTROL IN AMERICA* (2007)

¹¹ GARROW, *LIBERTY AND SEXUALITY* at 94-95; GORDON, *THE MORAL PROPERTY OF WOMEN* at 291.

¹² This was the use of birth control emphasized and explicitly protected in *Griswold*. *Griswold*, at 496.

¹³ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

and the HHS regulations governing the birth control mandate itself, on the health needs of women for whom pregnancy could be injurious or life-threatening.¹⁴ So, birth control, as a means by which healthy women, whether married or not, can control fertility, and likewise, birth control as a way to free the sexual expression of anyone, male or female, who wishes to engage in sexual activity free of the risks, and fears of the risks, of conception, just doesn't make an appearance. The scholarly literature on *Hobby Lobby*, both preceding the decision and in its wake, has followed suit. Again, save the occasional article in the popular press, there is virtually no discussion in the sizeable cottage industry of *Hobby Lobby* legal commentary,¹⁵ and rarely even an acknowledgement, of what birth control *is*, for the vast majority of users and objectors both: for many women, a means of limiting fertility, whether or not a pregnancy would be health or life threatening, and for perhaps an even larger number of men and women both, a way of facilitating sexual liberty, free of both the anxiety and the risks of reproduction.

Nor do we hear much of the *arguments* for or against birth control that presuppose that understanding of birth control's point, in the legal, cultural and political discussions that have surrounded *Hobby Lobby*. We don't hear much, for example, in this round of our battles over birth control, of the virtues or vices of our changing demographics as family sizes shrink, or of the value of the entry of women into the workplace, prompted, in part, by their control of their own fertility, which is in turn facilitated by birth control, or of the greater participation of large numbers of men in parenting their young children that is tied to the same social developments. We don't hear much of the lack of censure or stigma attached to the status of either childlessness or illegitimacy. We are not asked, in our current legal and constitutional debates, to imagine the difficulties or unfairness of lives consumed by a cycle of continual and unwanted pregnancies, breastfeeding, and the raising of small children, occupying for many the course of an entire adult life, from the onset of menstruation to death, much less of lives severely shortened by that fate, rather than the reproductive lives so many of us enjoy, courtesy of birth control: lives punctuated by the arrival of much wanted children occupying a central part of a life, but a life that is also occupied by work, leisure and adult civic and cultural pursuits. We don't hear Loretta Lynn's or Matt McGinn's strong country voice: "The pill, the pill/ I'm pining for the pill/ I'll never have anymore/ because they're going to bless the pill"¹⁶ –he was wrong on that last part – widely credited by health organizations with having done more to educate rural women, in the nineteen seventies and eighties, on their reproductive options than any education or public health

¹⁴ *Id.* at 2799.

¹⁵ Much of the progressive commentary on *Hobby Lobby* has focused not on the ACA per se, but on the weaknesses and vagueness in the Religious Freedom Restoration Act, and the result oriented decision making which the act prompts. See, e.g., Ira Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015).

¹⁶ MATT MCGINN, *The Pill*, on HONESTY IS OUT OF THE FASHION (Transatlantic XTRA 1968); PETE SEEGER, *The Pill*, on PETE SEEGER: A LINK IN THE CHAIN (Columbia/Legacy 1996); LORETTA LYNN, *The Pill*, on BACK TO THE COUNTRY (MCA Records 1972).

campaign before or since.¹⁷ We hear even less – we don’t hear anything really -- of the value of the sexual expression that is facilitated by the liberation of heterosexual intercourse from the risks and concerns of unwanted pregnancies. On the other side of the ledger, we don’t hear much of the moral wrongs that birth control qua birth control either constitutes or facilitates, according to its socially conservative critics. We are not being asked, in this round of our debates, to try to imagine, or at least understand, what’s wrong with a sexuality in which the body is used as an instrument for pleasure untied to the particular moral end of conception, or of the host of social harms, from the difficulties of unwed parenthood to the spectacle of a sex-saturated popular culture thrust on the interested and uninterested alike, that might emanate from that use. We hear absolutely nothing of radical feminist objections to birth control – objections that have been present as a constant counterpoint to both liberal and liberal feminist campaigns endorsing it from the middle of the nineteenth century to the early decades of this one: the claim, that is, that birth control, both the nineteenth century and twentieth and twenty first century versions, frees up, mostly, male exploitation and control of female sexuality, and that while it may indeed deliver control of fertility, without real equality, it delivers that control into male, not female hands.¹⁸ To sum this up, we don’t hear much, if anything, of the notion that birth control, again precisely because it facilitates the control of fertility and promotes sexual liberty, is either a boon to mankind for its contribution to women’s equality or health, free sexual expression, or family planning, or a dire threat, because of its destruction of the nexus of family, marriage, sexuality and conception, the belief to which it gives rise of a false equivalence of sexuality with sport or expression or play, or its facilitation of greater rather than lesser male control, commodification and exploitation of female sexuality. In part, this massive censorial silencing of any discussion of the social meaning of birth control reflects a more general phenomenon: we don’t hear much of the substance of *any* serious arguments for or against birth control. But our censorial instincts on this score seem greatest with respect to the social meaning that *Griswold* and *Eisenstadt* jointly implied: that the use and dispensation of birth control is protected by an individual right to privacy, and it is so protected precisely because it both facilitates the control of fertility and opens the doors to sexual liberty unconstrained by anxiety stemming from the risks of conception.

A full assessment of this odd silence in our social-sexual discourse is largely beyond the scope of this article (maybe we’ve just grown weary of the debate), but

¹⁷ Rock Hall, *Spotlight Exhibit: Loretta Lynn*, THE ROCK HALL BLOG, THE ROCK AND ROLL HALL OF FAME AND MUSEUM (Feb. 10, 2:30 PM), http://rockhall.com/blog/post/7268_spotlight-exhibit-loretta-lynn-women-who-rock/#sthash.14ZxePrf.dpuf.

¹⁸ On 19th century feminist objections to birth control and abortion, see GORDON, *THE MORAL PROPERTY OF WOMEN*; on 20th century objections, see Catharine MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (Cambridge, Harvard University Press 1987); Catharine MacKinnon, *Abortion: On Public and Private*, in *TOWARD A FEMINIST THEORY OF THE STATE* (Cambridge, Harvard University Press, 1989).

at least three reasons for it are purely legalistic, and a function of the *Hobby Lobby* case itself, and merit a brief mention here. The first, and maybe the most central, concerns the interests at stake and the parties representing those interests in *Hobby Lobby*. The Green and Hahn families who challenged the ACA's birth control regulations only objected to those methods of birth control that they believed to be abortifacients, thus mooted any larger argument regarding the immorality of birth control generally. The families' objection to those forms of birth control, in other words, was not that birth control per se is immoral, but rather, that the forms of birth control to which they objected effectively constituted an "abortion" and were therefore immoral --- they destroy a human life.¹⁹ There was no reason, for purposes of that piece of litigation, to assert the deeper and broader argument against birth control qua birth control put forward by both the Catholic Church and now accepted by a number of social conservatives -- although the Court gives no indication that the outcome would be or will be any different, once the broader objection is raised. On the other side, the Affordable Care Act itself and the regulations regarding the coverage of birth control, characterized birth control as an enhancement of women's health, akin to other forms of preventative care such as cancer screenings and mammograms. Again -- at least in *Hobby Lobby*, the government made no mention of family planning, control of fertility, or sexual expression, as key to the service the regulation covers.²⁰ So, one side in *Hobby Lobby* construed birth control as an abortifacient and the other as a health enhancement -- *neither* construed it, much less discussed it, as any technology -- whether or not it is believed to cause an abortion -- the point of which is to control fertility or liberate sexual expression or both, and for healthy and unhealthy people alike.

Second, in one of the opinion's most peculiar moments, the majority accepted in one fell swoop and without elaboration the government's compelling interest in assuring the accessibility of birth control to those who would choose to use it, obviating apparently any need to discuss what that compelling interest might be.²¹ Why *does* the government have a compelling interest in ensuring access to birth control? And, what *is* that interest? The opinion provides no clue. There was absolutely no discussion of this question -- which one might sensibly think central -- in the majority opinion; there didn't need to be, the majority reasoned, because the government had not used the least restrictive means of fulfilling it, whatever that interest might be.²² This was an odd lacuna and was by no means logically required: the Court could just as easily have asserted the clear need to discuss both the existence and the nature of the government's compelling interest precisely in order to reach the "least restrictive means" analysis. But they didn't, and because they didn't, there was no discussion of the merits of any argument for the importance of

¹⁹ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2764–66.

²⁰ Reply Brief for Appellant-Petitioner, *Sibelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2013) (No. 13-354).

²¹ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780.

²² *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780-82.

birth control or for its accessibility, whether grounded in the control of fertility, women's equality, women's health, or sexual liberty.

And third, the logic of the right won in *Hobby Lobby* – the right to be exempt from what is otherwise a law of general applicability because of a religious belief -- much like the right of privacy constructed fifty years ago in *Griswold* – the right to a practice criminalized by an otherwise valid law -- quite generally resists the elaboration of moral arguments for the behavior or belief that the right in question seeks to exempt from regulation. *Both* rights – the constitutional right to use birth control, and the RFRA right to be exempt from a health regulation that requires the cooperation of employers in its dispensation -- like a number of other substantive due process and first amendment rights recognized over the past two decades, are clear examples of what I have elsewhere called “exit rights”²³: they grant their holder the right to exit some socially, politically or legally constructed project, because of individual disagreement with that project's end or purpose.²⁴ Elsewhere, I've contrasted these “exit rights” with earlier generations of legal and constitutional “rights of entry,” such as integrationist rights and (most) civil rights, and then criticized the former for their anti-democratic and anti-communitarian character.²⁵ Thus, the first and fourteenth amendment *Yoder*-styled “right to homeschool” fervently sought (although not yet won) by some religious parents,²⁶ the first and fourteenth amendment rights of individuals – obliquely recognized by Justice Roberts -- to exempt themselves from the ACA's mandate to purchase health insurance,²⁷ the second amendment rights of gun owners to extract themselves from the social compact, and privatize the most quintessentially public duty of

²³ Robin West, *Tale of Two Rights*, 94 B.U. L. REV. 893 (2014); Robin West, *Toward a Jurisprudence of the Civil Rights Acts*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY* (Samuel Bagenstos & Ellen Katz eds., University of Michigan Press 2014); Robin West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713 (2011).

²⁴ Robin West, *Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract* (forthcoming).

²⁵ Robin West, *Toward a Jurisprudence of the Civil Rights Acts*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY* (Samuel Bagenstos & Ellen Katz eds., University of Michigan Press 2014).

²⁶ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Jonathan L. v. Super. Ct.*, 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008); Michael E. Hersher, “*Home Schooling*” in *California*, 118 YALE L.J. POCKET PART 27 (2008); Robert Reich, *On Regulating Homeschooling: A Reply to Glanzer*, 58 EDUC. THEORY 17 (2008); Robert Reich, *Why Homeschooling Should Be Regulated*, in *HOMESCHOOLING IN FULL VIEW: A READER*, 109 (Bruce S. Cooper, ed., Information Age Publishing 2005); Kimberly A. Yuracko, *Off The Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123 (2008).

²⁷ Roberts attributes this individual right– a right to not make commercial purchases, even if the refusal to make such a purchases impacts interstate commerce, and thus to be free of law requiring such purchases -- to the meaning of our “Constitutional Order.”

policing against violence,²⁸ the first amendment rights of workers to not support the political work of the unions that represent them,²⁹ and perhaps paradigmatically, the first amendment rights of religious churches, schools and hospitals to exempt themselves from obligations imposed by the Civil Rights Acts for purposes of their ministerial staffs³⁰ - all of these rights, like both the “right to privacy” constructed by the Court in *Griswold* and the exemption from otherwise binding obligations constructed in *Hobby Lobby*, permit the right holder to exit some aspect of our social compact.³¹ As these exit rights proliferate, and as their logic of exit becomes ubiquitous and even defining – as “exit” becomes how we think of and about rights – our constitutional discourse drifts, or lurches, toward a consensus around a disturbingly fractured conception of community and democracy both.

Here, my point is considerably narrower, and purely descriptive. Like virtually all exit rights, both the right to privacy constructed by *Griswold*, and the right to an exemption from the ACA recognized by *Hobby Lobby*, are constructed in such a way that the *moral argument* for the behavior for which either the exemption, on the one hand, or the protective right of privacy on the other, is sought, becomes inaccessible, virtually by design. To have an “exit right” just *is*, in effect, to also have a right to be exempt from the need to defend or even explain the behavior or the belief the exit protects. Moral and political arguments, like conscience itself, become profoundly privatized. Thus, the privacy right constructed in *Griswold*, *Eisenstadt* and *Roe*, constitutionally protects not only the right to use birth control or procure an abortion, but also protects from scrutiny the reasons one might have for doing so. In *Hobby Lobby*, the exemption sought and won similarly protects more than the refusal to participate in the provision of birth control to one’s employees. It also protects the Hahns’ and Greens’ assertion that the particular oral contraceptives and IUDs which they found offensive are in fact abortifacients from critical examination, even though that claim was not just contested but aggressively denied by the medical community,³² as well as their

²⁸ *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008); Robin West, *Tale of Two Rights*, 94 B.U. L. Rev. 893 (2014).

²⁹ Amanda: please look at my piece *Toward a Jurisprudence of the Civil rights Act*, which is up on SSRN (the book is not yet out, I thought it was....).

³⁰ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

³¹ Robin West, *Toward a Jurisprudence of the Civil Rights Acts*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY* (Samuel Bagenstos & Ellen Katz, eds., University of Michigan Press 2014).

³² Brief for Physicians for Reproductive Health et al. as Amici Curiae Supporting Petitioners, *Sebelius v. Hobby Lobby Stores*, 134 S. Ct. 2751(2013) (No. 13-354). (arguing that “scientific evidence confirms that FDA-approved forms of emergency contraception are not abortifacients....” and “a ‘contraceptive’ refers to that which prevents fertilization of an egg or prevents implantation of a fertilized egg- in other words, it prevents a pregnancy from taking place. ‘Emergency contraception’ (EC) refers to a drug or device used after intercourse, but before pregnancy, to prevent pregnancy from occurring.” When looking at emergency contraceptives... effects are

belief that their role in the distribution of these devices would burden their religious practices,³³ even though whether or not a legal requirement constitutes a burden, under older First Amendment doctrine, is a legal and not a factual question, requiring a judicial resolution.³⁴ More broadly, RFRA's logic of "exemption" and the Court's interpretation of that logic, combined with *Griswold* and *Eisenstadt's* logic of "privacy," have shrouded not only the use of birth control from criminal sanction, and the decision not to cooperate in the provision of birth control to one's employees from legal interference, but have also exempted the arguments of both sides supporting those decisions from any sort of critical engagement. That reticence, now constitutionally and legally sanctioned, seems to have spread to the commentary. There's quite a bit that we just don't talk about, when we talk about *Hobby Lobby*, simply by virtue of the fact that we have legalized, and to some degree constitutionalized, the terms of debate. Birth control's social meaning and arguments for and against its use that presuppose that meaning, seem to be within that sphere of silence. That silence, in fact, may turn out to be part of *Hobby Lobby's* lasting legacy.

But whatever the reasons for it (and whatever the motivation for it) this distinctive and very modern silence from the Court, the litigants themselves, and the scholars who have written on the case, regarding the strength of the various arguments for the use, misuse, or nonuse of birth control is itself unfortunate. First, it cedes the territory of contestation over birth control's social meaning to the Rush Limbaughs of the world: when discussion of birth control's social meaning does occur, it is accompanied by contempt and derision.³⁵ But there is a broader and a deeper problem that goes well beyond tone and the civility or incivility of our discourse. Arguments for and against birth control, claimed with varying degrees of explicitness over the last half-century, rest on competing conceptions of sexual morality – and more specifically, on competing conceptions of heterosexual morality -- which in turn affect the quality of our sexual and reproductive lives. Thus, it is not just the various arguments for or against the use of birth control, but also the conceptions of heterosexual and reproductive morality on which those arguments

pre-pregnancy and thus, not abortifacients. IUDs release copper ions that alter endometrial lining. These alterations prevent implantation, rather than disrupting it. Further evidence shows that when taken post-ovulation, emergency contraceptives have no effect on preventing pregnancy. This is because the contraceptive is most effective when taken before the luteinizing hormone surge, which triggers the ovulatory process. Conclusion: emergency contraceptives approved by the FDA "do not interfere with pregnancy and are not abortifacients, because they are not effective after a fertilized egg has successfully implanted in the uterus.")

³³ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2775-76.

³⁴ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2798.

³⁵ Todd Gregory & Chelsea Rudman, *Limbaugh Launched 46 Personal Attacks On Fluke; He Apologized For Two Words*, MEDIA MATTERS FOR AM. (Mar. 5, 2012, 7:08 PM), <http://mediamatters.org/research/2012/03/05/limbaugh-launched-46-personal-attacks-on-fluke/184269>.

rest, that have become shrouded in a haze of constitutionally protected spheres of privacy and legally protected exemptions. We argue instead over the existence, scope, content and logic of those exemptions and privacies. As a result of all of this, to switch metaphors for a moment, we've effectively put not only the reasons that moral and religious objectors oppose the use of birth control, and the reasons so many of us have for wanting to use it, but also the competing conceptions of heterosexual morality that respectively ground those reasons, in a legal and constitutional black box. To the considerable degree that our constitutional discourse determines the scope of our social and political discourse, we've put both the arguments themselves, and the conceptions of sexual morality on which they rest, not only out of the permissible bounds of legal argument, but out of the realm of social, political and moral contestation as well.

This essay seeks to reverse this trend, simply by entering the breach. In the four sections that follow, I first briefly examine, and then criticize, each of two of the major arguments – which are by no means the only arguments -- that I believe have largely motivated opposition to birth control, on the one side, and support of its use on the other, for at least the last half-century, and the conception of heterosexual morality on which each of these two arguments depends. In the first two of those four sections, I will take up and then criticize what I will call (following common usage) the “neo-natural lawyers’ argument” against the use of birth control within marriage, first made in a papal encyclical in the 1930s, and then more recently, over the last twenty years, and in a form entirely accessible to (and intended for) a secular audience, in a number of law review articles by prominent contemporary legal philosophers, including John Finnis, Robert George and George Bradley. In the third and fourth sections, I look at and criticize a “sexual-libertarian” (hereafter, sometimes, “libertarian” for short) argument for the use of birth control. The sexual libertarian’s brief for birth control, unlike the natural lawyer’s brief against it, does not have a canonical text, or set of canonical texts. Rather, the libertarian argument I will first construct and then criticize, although sometimes explicit, is for the most part largely implied by a host of claims about sexual morality and sexual autonomy made over the last half century: first (and quite obliquely) by the liberal jurists in *Griswold* and *Eisenstadt* themselves, followed, decades later, by somewhat more explicit claims of the same nature in *Lawrence*,³⁶ and ultimately by scores of liberal, liberal feminist, libertarian, pro-sex, queer and libertine political activists and legal theorists since then. Again, to be clear, not all of these activists, jurists, and scholars *make* the particular argument for birth control that I will construct and then criticize; indeed many of them – maybe most of them -- don’t address birth control at all, for reasons I will discuss. Rather, my claim will be that the nevertheless widely accepted – even if rarely articulated -- sexual libertarian argument for birth control that I will construct and criticize is not a strawman; it is expressed by some and quite clearly implied – and, I believe, assumed -- by the various explicit claims made about sexual and heterosexual morality by all of these political actors, legal scholars, liberal jurists, and liberal, libertarian, and libertine political thinkers.

³⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

In both sections, my critical focus will be not only on the competing arguments against or for birth control put forward by neo-natural laws and sexual libertarians respectively, but also on the competing conceptions of heterosexual morality that underlie each of the two sides' arguments. I will eventually argue that both the natural lawyer's and the sexual libertarian's conceptions of sexual morality are problematic, and that, for all their differences, they are problematic in a strikingly similar way: the conception of heterosexual morality held by each side, on which their competing arguments for the immorality or utility of birth control depends, conditions the morality of heterosexual sex in very different ways, but in both cases they do so in ways that give very short shrift to women's actual felt desires, either for the sex itself, or for the pregnancy, or both. Thus, the natural lawyer's major argument against birth control rests on a conception of heterosexual morality that celebrates *all* non-contracepted (or procreative) marital sex and all the pregnancies that sex causes, regardless of whether the wife desires either the sex itself or the pregnancy that is its entirely foreseeable result, while the sexual libertarian celebrates all non-procreative sex that is "consensual," or autonomous, regardless of a woman or girl's desire or lack of desire for the sex, or the pregnancy that might – because of either the failure or misuse or nonuse of birth control -- result. These are consequential omissions, both in terms of the two sides' arguments for or against birth control, and more broadly. Conceptions of sexual morality ground ways of living and being in the world: they are manifested in our sexual expectations of ourselves and each other, in our modes of sexual behavior, in our reproductive decisions, in our understanding of and relation to our own reproductive labor, and most fundamentally in our self understandings – self understandings that in turn inflect our nonsexual as well as our sexual interactions. They impact what we ask of ourselves and our sexual partners, what we mean and what we achieve when we aim for sexual satisfaction, how we experience our pregnancies, and how we regard the joys and sorrows we undergo when raising our children. The conceptions of sexual morality that we hold and act on affect how we live, in other words, as well as what we believe. What I want to urge here is that at least two of our modern conceptions of heterosexual morality as well as the behavior they ground – including the use or nonuse of birth control – in spite of all of their striking differences, conceive of moral heterosexual sex as sex that occurs in spite of a woman's lack of desire for the sex or the pregnancies that might result. As such, they impose quite real harms on many women and some men, and of a notably similar sort.

My conclusion is that behind the constitutional veil of privacy protected by *Griswold* and *Eisenstadt* and celebrated by sexual libertarians, and behind the legal exemption recognized by *Hobby Lobby* and treasured by social conservatives and their neo-natural lawyer advocates, lie claims about the morality of heterosexuality and reproduction that run roughshod over women's felt pleasures and women's felt desires regarding both. The resulting practices, including the use or nonuse of birth control, are thus grounded in claims and practices surrounding heterosexuality that undergird not only the blossoming of life, as per the natural lawyers' claim, or sexual liberty, as per the libertarian's, but also quite concrete conditions for women's subordination, both in traditional marriage and in the larger secular and sexualized

culture. Our current legalistic clashes over birth control marginalize these claims, and thereby obfuscate those harms, and the subordination those harms entail. This article seeks to at least put these arguments, along with the extremely problematic conceptions of heterosexual morality on which they rest and the political and psychic harms they may occasion, back on the table.

a. *The Natural Lawyers' Brief Against Birth Control*

Without contraception, hetero, penetrative, vaginal-penile sexual intercourse relatively predictably leads to conceptions, many of which eventually blossom into full pregnancies and then live births. The contemporary neo-natural lawyers' brief against the use of birth control, first made in a papal encyclical in 1930, has centered on the claim that both those sexual acts and the blossoming of life to which they lead, and not the pleasure which may happily be their byproduct or the love they may cement, is the very *point* of marriage itself, at least when marriage is properly understood.³⁷ Contrary to the Court's claim in *Eisenstadt* that a marriage is nothing more than a voluntary association of two individuals,³⁸ a marriage, according to both contemporary neo-natural lawyers and the canonical authorities on which they rely, is a union of a man and woman for whom and between whom the spiritual and biological unity achieved through "sex of the reproductive form" – by which is meant heterosexual, noncontracepted, vaginal-penile, penetrative intercourse -- both constitutes an act of spiritual friendship and an opening to the creation of life.

³⁷ *Casti Connubii*, Encyclical of Pope Pius XI on Christian Marriage to the Venerable Brethren, Patriarchs, Primate, Archbishops, Bishops, and other Local Ordinaries Enjoying Peace and Communion with the Apostolic See, reconfirmed in Pope Pius XII, *Nature of Their Profession*, Allocution to Midwives (1951), and in Encyclical Letter *Humanae Vitae* of the Supreme Pontiff Paul VI to his Venerable Brethren, Patriarchs, Primate, Archbishops, Bishops, and other Local Ordinaries Enjoying Peace and Communion with the Apostolic See, to the Clergy and Faithful of the Whole Catholic World, and to All Men of Good Will, on the Regulation of Birth (1968). See generally Gerald Kelly, S.J., *Contraception and the Natural Law*, in PROCEEDINGS OF THE EIGHTEENTH ANNUAL CONVENTION OF THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA CONTRACEPTION AND NATURAL LAW (1963). The author notes in this paper that a considerable portion of that paper is taken from *Contemporary Moral Theology, II: Marriage Questions* (Westminster, Newman Press 1963) by John C. Ford, S.J., and Gerald Kelly, S.J.. For the modern arguments see Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 301-320 (1995); Christopher Tollefson, *The New Natural Law Theory*, 10 LYCEUM 1 (2008) available at <http://lyceumphilosophy.com/?q=node/97>; Germain Grisez, Joseph Boyle, John Finnis & William E. May, *Every Marital Act Ought to Be Open to New Life: Toward a Clearer Understanding*, 52 THOMIST 365, 365-426 (1988).

³⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.").

That form of sex – and only that form of sex – makes the husband and wife one flesh: both biologically and spiritually whole.³⁹ Sex that is of this reproductive form – or what they sometimes call “conjugal sex” -- is not simply a part of a healthy marriage, it is its very moral point. It is what marriage is *for*: marriage is that relationship within which heterosexual penetrative sex has this absolute moral value. It is that sex, then – not affection, not simple friendship, not mutual care and regard, not joint commitment to the welfare of each other, and not even the shared work of child-raising -- which gives marriage its meaning and value likewise. Birth control not only constitutes a form of endorsement of all the sex that is pursued for other ends, but it also both represents and facilitates the marital participants’ willful splintering of marital sex from its moral end or goal. It strips marital sex and therefore marriage itself of its natural and moral purpose, which is the physical unity of marital partners in a sexual act of spiritual friendship that is open to conception and the eventual creation of new human life. When used by marital partners, birth control is thus doubly wrongful. Outside of marriage, of course, it carries additional societal harms and wrongs as well.

What has gone relatively unnoticed about this argument, perhaps by the natural lawyers themselves but certainly by the natural lawyers’ legions of critics, is that the natural lawyers’ brief against birth control, rests on not one, but *two* related but nevertheless distinct claims about sexual morality. The first claim might be called the “censorial claim”: all sexual relations that are *not* of the “reproductive form” (marital, hetero, non-contracepted, vaginal-penile and penetrative), according to the natural lawyers, are immoral. *All* such sex constitutes an instrumental use of the body for other ends – whether that end be profit, exercise, pleasure, friendship, or affection -- and thus an illicit splintering of the body and mind, or body and soul. The censorial claim, in other words, asserts the *necessary condition* for moral sex: for sex to be moral, it must be “of the reproductive form.” All sex that does *not* meet that condition is immoral; contracepted sex inside or outside of marriage does not meet those conditions, therefore, contracepted sex is immoral – and thus, the moral wrongness of birth control.

The second claim, which is far less often examined and almost never criticized, is what I will call the natural lawyers’ “valorizing claim”: all sex that *is* of the reproductive form – sex that is hetero, vaginal-penile, penetrative, within marriage and – most important here -- *uncontracepted* – is an unalloyed, natural, human, spiritual and intrinsic good. This second claim asserts, in effect, that the reproductive form is a *sufficient* condition for moral sex: all marital sex that *is* of the reproductive form is a natural, human good. There are no further conditions to its value. The use of birth control therefore frustrates participation in what would otherwise be a morally praiseworthy, highly valorized, and intrinsically good act: sex within marriage of the reproductive form (hereinafter, for short, “sex of the marital form”, or sometimes, where the usage would not be ambiguous, “marital

³⁹ Robert P. George & Gerard V. Bradley, Marriage and the Liberal Imagination, 84 GEO. L.J. 301, 301-320 (1995); Germain Grisez, Joseph Boyle, John Finnis & William E. May, *Every Marital Act Ought to Be Open to New Life: Toward a Clearer Understanding*, 52 THOMIST 365, 365-426 (1988).

sex.”). The natural lawyers’ brief against birth control then consists of two arguments, and they are quite separate: first, contracepted sex even within marriage, just like, and for the same reasons as, same sex-sex, fornication, adultery, prostitution, and sex within marriage that is not of the reproductive form for some other reason (non-penetrative, etc.), all of which they call alternately “recreational,” “affective,” “instrumental,” or “pleasurable,” is wrong. This follows from the censorial claim. But second, so long as it is marital, *non*-contracepted sex – sex that is open to the possibility of pregnancy – is a fundamental, unassailable human good. The use of birth control within marriage negates or frustrates participation in that human good. The second is a claim not about what sex is immoral and wrong, but rather, what sex is fundamentally and always – unconditionally – *good*: procreative sexual intercourse of the reproductive form within marriage. The use of birth control by married partners prevents what would otherwise be participation in this natural human good.

The natural lawyer’s censorial claim – that *only* sex of the marital form is moral, or that all sex that is not of this form is immoral – has, perhaps needless to say, attracted a tidal wave of criticism by legal scholars as well as sexual ethicists, in large part because of the major implications it seems to entail that pertain to law (or, more accurately, its entailed implications that have in the recent past pertained to law, given a pre-*Lawrence* conception of the scope of the police power), including, but by no means limited to, its censorial stance toward birth control.⁴⁰ First, of course, it immediately follows from the natural lawyers’ censorial claim that “same-sex marriage” is oxymoronic and its provision by states ill-advised: civil marriage is the legal institution the very point of which is to protect the social institution of marriage, which in turn and by definition exists so as to facilitate heterosexual, penetrative sex of the marital form, meaning that sex – penile-vaginal, penetrative and procreative -- which in form leads to conception.⁴¹ This is the argument that has been most criticized by commentators and has been likewise rejected by almost every court that has examined it, as well as by increasing numbers of state legislatures: whatever might be true of the neo-natural lawyer’s understanding of marriage, *civil* marriage, as defined and enforced by states, can serve a number of purposes, including the provision of a legal form through which same sex or opposite sex partners can publicly commit themselves to each others’ care, express their love sexually and otherwise, conceive and raise children should they so desire, and not at all least, provide a private “safety net” for the support of each other, thus lessening the need of the state to do so.⁴² Second, and as now countless commentators have argued, it follows from the natural lawyer’s censorial claim that

⁴⁰ See, e.g., Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995); Chai Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005).

⁴¹ See Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).

⁴² *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014).

non-marital sex in any form and toward any end, including all same-sex sex, contracepted or non-contracepted heterosexual sex between unmarried persons, or sex between partners of either or any gender that is motivated by a desire to cement feelings of long-lasting and deep love, is illicit.⁴³ Only traditionally married partners can engage in the sexual relations that are of the right, meaning “marital,” form. Therefore, unmarried persons, including all gays and lesbians, should not engage in sex at all. Unmarried straight people of course can aspire to marry and enjoy a sexual life; gay people, though, should simply abstain. It thus denies the morality not only of gay sex that is sought solely for pleasure, or money, or prestige, but also of affective gay sex, meaning sex between same-sex partners who are committed to each other and to a long term or life-long relationship, who may wish to civilly marry in those states that allow it, and who may wish to have and raise children. If correct, this would suggest either a reason to criminalize both gay sex and fornication, or at least a reason not to encourage it through opening up the marital franchise.⁴⁴ A number of commentators, including most prominently Steven Macedo and Chai Feldblum, have argued that proponents of the censorial claim simply fail to see the moral value of affective sex, and particularly of gay affective sex.⁴⁵ (For that reason, Macedo provocatively called this prong of the natural lawyer’s argument a “failure of the conservative imagination;”⁴⁶ Feldblum for similar reasons titled the article in which she argues against the censorial prong of the natural lawyer’s understanding, “Gay is Good,”⁴⁷ by which she meant, gay sex is a positive moral good, and not just an activity protected by privacy rights.)

Third, it follows from the natural lawyers’ censorial claim that not only should only married heterosexual partners engage in sex, but married partners should engage in only *that form* of sex. Sex “of the right form” within marriage is a sacred comingling of the marital participants in a form of sexual intercourse that has a particular teleological *purpose*, to wit, conception. All other sex, including sex *inside* of marriage that is either contracepted or that is otherwise not of the right form (meaning, non penile-vaginal or non-penetrative), interrupts the moral link between marital sex and conception, thus stripping sex of any moral or religious purpose. It reduces it to an instrumental use of the body for nothing but base pleasure. This prong of the argument has of course also been subjected to criticism,

⁴³ Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995).

⁴⁴ Finnis argues for the latter, viewing the criminalization of gay sex unwise and unjust for traditionally liberal reasons.

⁴⁵ STEPHEN MACEDO, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 2XX (1995); STEPHEN MACEDO, *Against the Old Sexual Morality of the New Natural Law*, in NATURAL LAW, LIBERALISM, AND MORALITY (Robert P. George, ed., Clarendon Press, 1996); Chai Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005).

⁴⁶ Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 2XX (1995).

⁴⁷ Chai Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005)..

including by both birth control advocates and sexual libertarians, from the nineteen twenties through the 1970s.⁴⁸ In short, to sum the criticism, the natural lawyers' censorial condemnation of contracepted and non-vaginally-penetrative marital sex, as well as all extramarital and same-sex sex, rests on a view of sexuality, pleasure and love that seems untrue to the experience of vast numbers of married as well as unmarried people. For many married and unmarried partners alike in long term committed relationships, contracepted or non-penetrative sex is both moral and of great value: its value and its morality both lie in the pleasure it facilitates and the way in which it cements the partners' affection for each other. The same seems true, furthermore, for many people, in same sex and opposite sex relations of shorter duration, and again regardless of the type of sex in which the partners are engaged.

Common to almost all of the contemporary criticisms from political theorists and legal scholars that have been widely aired of the canonical and neo-natural lawyers' conception of heterosexual morality, however, has been the critics' focus on the Church's censorial claim. That is, the natural lawyers' secular critics have focused almost entirely on all of the sex that the natural lawyers morally *condemn*: sex-for-pleasure of all forms in or outside of marriage, expressive sex within or outside marriage, opposite as well as same-sex sex outside of traditional marriage that expresses and enhances love in long lasting and committed relationships, and, of course, contracepted sex inside traditional marriage, the point of which is not only to give and receive pleasure but also to cement love and affection. What has been roundly criticized by the natural lawyers' legal critics, in other words, with only a few exceptions, is the neo-natural lawyer's censorial claim that the "marital form" is a necessary condition of the morality of sexual activity, and that all sexual activity that doesn't meet that condition is immoral. What has gone almost entirely un-criticized, by contrast, and indeed almost unnoted, is what I've called above the natural lawyer's "valorizing claim": the claim that all marital sex of the marital form – uncontracepted, vaginal-penile, penetrative sex in marriage – is an intrinsic human and common good, or more briefly, that the marital form (which again includes the requirement that the sex be un-contracepted) is a *sufficient* condition for the goodness of sex. Critics have focused, almost entirely, on the sex that the natural lawyers are *against* (which includes contracepted sex) and criticized them for that reason. By contrast, the critics have focused almost not at all on the sex that the natural lawyers are so fervently *for*: sex "of the marital form" within marriages, and

⁴⁸ For early twentieth century arguments focused on feminist campaigns against involuntary motherhood and the institutions of marriage and the Church, see *The Public Writings and Speeches of Margaret Sanger*, available at <http://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=128167.xml>; Margaret Sanger, *No God, No Masters*, in *THE WOMAN REBEL*, March 1914, 1, 8, 16, at <http://historymatters.gmu.edu/d/5084/>. For late twentieth century arguments focused on sexual liberty, see, e.g., DAVID A.J. RICHARDS, *RESISTING INJUSTICE AND THE ETHICS OF CARE IN THE AGE OF OBAMA: "SUDDENLY... ALL THE TRUTH WAS COMING OUT"* (Routledge, 2013); Carol Gilligan and DAVID A.J. RICHARDS, *THE DEEPENING DARKNESS: PATRIARCHY, RESISTANCE, AND DEMOCRACY'S FUTURE* (Cambridge University Press, 2009); David A.J. Richards, *Women, Gays and the Constitution* (University of Chicago Press, 1998).

the pregnancies to which they lead. Those sexual acts, and those pregnancies, again, for neo-natural lawyers, are the moral point of marriage itself. *All* sex “of the marital form” – *all* hetero, penetrative, vaginal-penile, uncontracepted sex within marriage -- is morally salutary. Such sex is an intrinsic human and common good.

This second, and much less examined valorizing natural law claim regarding the absolute goodness of marital sex, rather than the badness of non-marital, is at least as equally significant a part of the natural lawyers’ brief against birth control -- although it doesn’t figure so centrally in their argument against homosexuality, which may be why it has gone relatively uncriticized. Thus, the natural lawyer’s argument against birth control does not rest *solely* on the censorial claim that contracepted sex, as well as all other non-marital sex, is *bad*. It is a gross misunderstanding – and a serious diminution -- of the natural law view of human sexuality and of sexual morality to limit it to its censorial claim condemning the sex they view as immoral. Rather, the natural law view of sexuality, in its totality, also rests on the profoundly valorizing and radically *pro-sex* claim that all non-contracepted sex of the marital form, (including such sex between infertile couples, where the infertility is for natural reasons) *and* all the pregnancies to which that sex often leads, are all very, very *good*. Indeed, the wrongness of birth control used *within* marriage (as contrasted to outside marriage) is precisely that it interrupts that form of morally praiseworthy sex by intentionally and artificially frustrating the possibility of conception. The wrongness of birth control, in other words, is not only that it facilitates immoral sex, but also that it frustrates otherwise morally exemplary procreative sex -- which is the *raison d’etre*, and the very center of married life. It is this valorizing *pro-sex* claim of the natural lawyers, as well as the argument against birth control which it grounds, that has gone virtually unnoticed by the natural lawyers’ contemporary critics.

As a consequence, in part, of the natural lawyers’ critics’ relative inattention to it, not only the natural lawyer’s valorizing claim itself – that uncontracepted marital sex is an intrinsic human good – but also the harms -- particularly for married women -- that claim might engender when it grounds married life, have gone relatively unnoticed in the scholarly literature, although not, one might surmise, in married life itself. Critics have focused on and catalogued instead the harms caused by the censorial claim: the denial of the equal value and worth of same-sex affective sex, the unnecessary censure of sexual expression, the dour and damning stance toward sexual pleasure both within and outside marriage, the sizeable social costs of criminalizing or censoring prostitution, fornication, or homosexuality, and of course the condemnatory stance toward same-sex couples and same-sex marriage, with the consequent inequalities and heartache that condemnation visits upon a sizeable portion of the population. Critics have not looked at the harms that might be caused by the natural lawyers’ valorizing *pro-sex* claim: that all uncontracepted sex within marriage that is of the marital form is an intrinsic human good. The legalistic black box created by RFRA, *Hobby Lobby*, and the debate surrounding that case, as described above, pushes those arguments, and the harms they might cause, all the further from public awareness. Those harms, though, are quite real, and they are utterly distinct, and quite different, from the

harms caused by the censorship of pleasurable and affective sex. The next section tries at least to catalogue them.

b. *Is Procreative Marital Sex an Intrinsic Good? One Critique*

What does the neo-lawyers' blanket moral celebration of all uncontracepted marital sex include? What falls within the category of the sex the natural lawyers approve, applaud, and celebrate, and might some of that laudatory celebration be misguided?

Does it include, for example, *nonconsensual* marital sex? Does the "sex of the reproductive form," that, according to the natural lawyers is an intrinsic and natural human good, include rape? It isn't at all clear.⁴⁹ In their many elaborate definitions and descriptions of marital sex, and their constant iteration of the various conditions that sex must meet, in order for it to be moral and praiseworthy, "mutual consent" of the parties is never, that I can find, unambiguously included. Its enough, rather, that sex be marital: consent doesn't enter the picture. Thus, Thomas Aquinas believed that married women have a positive duty to be sexually available to their husbands, and to deny their husbands sexual access was sinful (and vice versa; men likewise have a duty to be sexually available to their wives). A woman who withholds sex from her husband, he believed, commits a greater sin than a man's rape of a stranger – the former is a sin against nature, while the latter is simply a sin against a person.⁵⁰ A "marital rape," therefore, is the result of a *woman's* sin of withholding, not a man's sin of imposing. The Encyclical from 1930 that explains the Church's view of marriage, marital sex, and family life, doesn't noticeably soften this Thomistic stance. In the only reference I could find to even the topic of consent, Pope Pius explains that periodic abstinence is an acceptable method of birth control, but only if *both partners* consent to it. Thus, presumably,

⁴⁹ As a legal matter, consent was not a condition of legal marital sex until the reforms of the 1980s began to result in the systematic removal, or at least trimming back, of marital rape exemptions in states' regulation of rape. As Jill Hasday has shown in her seminal history of the period, nineteenth century feminists advocated against forced sex in marriage, albeit on varying grounds: forced sex in marriage leads to "excessive maternity," which in turn leaves women incapable of living out full adult lives, and incapable of adequately mothering the children they already have; it deprives married women of control of their own bodies, thus depriving them of physical integrity; it renders them incapable of exercising the autonomy necessary for civic life, and it subjects them to a host of physical harms and attendant health problems. None of these arguments got much traction, either in the time they were made nor in the century that followed. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

⁵⁰ I thank Mary Becker for the point. For a full discussion, see Mary Becker, David C. Baum Memorial Lectures on Civil Liberties and Civil Rights at the University of Illinois College of Law, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two are Better than One*, 2001 U. Ill. L. Rev. 1 (April 15, 1999).

the desire of only *one* party that the couple abstain from sex (in order to prevent conception) is not a sufficient grounds for abstaining: if one party wishes to abstain but the other party does not, the sex not only may happen but apparently should.⁵¹ To translate this into modern terms, a woman's "no," according to Pope Pius writing in the 1930s, may indeed mean no, but that "no" is not by itself a sufficient reason to abstain from marital intercourse if her husband does not agree; the man has veto power. By the sixties, this position had apparently softened, albeit only somewhat: in the 1968 Encyclical on birth control, Pope Paul references and apparently with some approval his understanding that "men have rightly thought" that for a man to impose sex on one's partner "against her *reasonable* wishes" (my emphasis) is a wrong – although this observation about what "men have rightly thought" is made only to suggest that anyone who so thinks, should *also* see the immorality of having sex against the reasonable wishes of the Divine Creator – meaning, should also see the immorality of contracepted sex.⁵² One wonders, though, what might be the status of a sexual act imposed against a wife's *unreasonable* wishes. Nevertheless, at least by the sixties, a married woman's no, within canonical catholic thinking on the topic, apparently means no and must be abided, so long as the "no" rests on reasonable grounds, or at least, according to the Pope, so some men rightly think.

It is still, today, not entirely clear whether the "marital form" that sex must be, in order for it to be morally exemplary, includes a requirement that it be consensual. Thus its worth noting that in the quite detailed contemporary scholarly discussions of the multiple necessary conditions for moral sex penned by contemporary natural lawyers – that it be between married partners, that it be non-contracepted, that it be penetrative and penile-vaginal rather than oral or anal or digital, and so on – there is never, that I have found, even a mention of the idea that it must also be consensual. There is no mention, for example, in Bradley and George's lengthy article from the mid-1990s in the *Georgetown Law Journal* detailing the nature of marital sex, that consent is a necessary condition for moral heterosexual relations.⁵³ Of course, that may well be because Bradley, George and other contemporary neo-natural lawyers now regard the necessity of consent as so apparent as to require no mention. But it's an odd and disconcerting omission nevertheless.

What, though, of *unwanted* marital sex? By that phrase, just to be clear, I do not mean *rape*, but rather, that marital sex to which a woman or a man unambiguously consents, but which she or he does not physically desire, and do not emotionally welcome or want. Does "sex of the marital form" that the natural lawyers laud include *that* sex – sex in which women engage, and to which they unambiguously consent, but which they do not physically or emotionally *desire*? Is *unwanted sex* included, within the natural lawyers' blanket valorization of marital sex? Given the insistent and now millennia-long valorization within Catholic theological thought of sex of the marital form itself – hetero, non-contracepted,

⁵¹ 1930 Encyclical at paragraph 53.

⁵² Faithfulness to God's Design, Paragraph 13, 1968 Encyclical.

⁵³ Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).

vaginal-penile and penetrative – its not unreasonable to surmise that an awful lot of that sex is indeed physically unpleasurable for women, simply because the type of sex endorsed has virtually nothing to do with the physical location of the sources of women’s sexual pleasure. For that reason alone, it seems fair to speculate that much of the sex that the natural lawyers laud is also not physically desired, and, perhaps, therefore not wanted or emotionally welcomed, by some, and maybe many wives. It might be fair to surmise, then, although there’s remarkably little scholarship on the point,⁵⁴ that women in traditional marriages engage in at least some marital sex (sex of the marital form) that they do not physically desire or find particularly pleasurable. If so, they are engaging in an act – unwanted, undesired, and unwelcome but nevertheless consensual sex – that is, according to a wave or recent social science research, apparently relatively common among heterosexual women, and, at least in some age groups among heterosexual men as well, and one that is

⁵⁴ There is a growing body of social sciences scholarship on unwanted sex engaged in by college students and young adults of both sexes, some of it inspired by and informed by feminist concerns that the willingness of young women to consent to sex they do not want is a function of gender role stereotyping. Alyson K. Spurgas, *Embodied Invisible Labor and Sexual Carework:*

Intimate Relationships, (unpublished manuscript) (on file with author); Emily A. Impett & Letitia A. Peplau, *Why Some Women Consent to Sex with a Dating Partner: Insights from Attachment Theory*, 26 *PSYCHOLOGY OF WOMEN QUARTERLY* 360-370 (2002); Shantee Foster, *Consensual Unwanted Sex: Motivations and Reservations* (May 1, 2011) (unpublished Ph.D. dissertation, The University of North Carolina at Greensboro); Sarah J. Walker, *When “no” becomes “yes”: Why girls and women consent to unwanted sex*, 6 *APPLIED & PREVENTIVE PSYCHOLOGY* 157-166 (1997); Susan Sprecher et al., *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students’ Dating Experience in Three Countries*, 31 *THE JOURNAL OF SEX RESEARCH* 125-132 (1994); Lucia F. O’Sullivan & Elizabeth R. Allgeier, *Feigning sexual desire: Consenting to unwanted sexual activity in heterosexual dating relationships*, 35 *THE JOURNAL OF SEX RESEARCH* 234-243 (1998); Charlene L. Muehlenhard & Stephen W. Cook, *Men’s self-reports of unwanted sexual activity* 24 *THE JOURNAL OF SEX RESEARCH* 58-72 (1988); Miriam Lewin, *Unwanted Intercourse: The Difficulty of Saying No*, 9 *PSYCHOLOGY OF WOMEN QUARTERLY* 184-192 (1995); Pamela I. Erickson, Andrea J. Rapkin, *Unwanted sexual experiences among middle and high school youth*, 12 *JOURNAL OF ADOLESCENT HEALTH* 319-325 (1991); Amy Buddie et al., *Consenting to unwanted sex: Effects of gender and relationship type*, Paper presented at the Annual Meeting of the Southeastern Psychological Association (2011); There is only one article that I have found on the propensity of married women to consent to sex they don’t want, and that involves young married brides in India. K.G. Santhya, Nicole Haberland, F. Ram, R.K. Sinha and S.K. Mohanty, *Consent and Coercion: Examining Unwanted Sex Among Married Young Women in India*, Vol. 33 *INTERNATIONAL FAMILY PLANNING PERSPECTIVES* 124 (2007).

increasingly recognized in that literature as carrying with it distinctive, serious and long lasting harms.⁵⁵

Short of physical coercion, why might women, including married women and including married women in traditional marriages, engage in unwanted sex? And what might the natural lawyers say of that sex, or those reasons for engaging in it? I will discuss the general phenomenon in some detail below (and have addressed it in greater detail elsewhere), here I will focus quickly on what might be married women's distinctive reasons for doing so. Presumably, women who have marital sex that they do not physically desire might do so for a host of reasons, at least some of which our two most prominent neo-natural lawyers – George Bradley and Robert George -- would (if I may speculate, they don't discuss this) criticize as “instrumental”: a married woman might engage in unwanted marital sex to retain her husband's affection, loyalty, fidelity, or support, to maintain relative domestic peace in the household, as a quid pro quo for his day to day financial support for herself and her children, to avoid her husband's foul mood, wrath, anger, or violence, out of altruism, pity, or friendship, or simply because she feels it is expected of her by their social or religious community. Again, I think its clear that Bradley and George would find most of these “instrumental” uses of the sexual body to achieve other ends worrisome, and I think they would be right to do so. In a similar vein, and in an arguably prescient passage, Pope Pius argued that the use of birth control within marriage might encourage in men a tendency to view their wives and their wives' bodies as a vehicle for the satisfaction of their own physical desires, rather than with the reverence that God and the Church demand and which their wives deserve.⁵⁶ This is at least an indirect but notably feminist condemnation of not only a husband's exploitation of his wife's body but also and more generally, a critique of unwanted marital sex, although couched within an argument against birth control and sex engaged in for pleasure, not in an argument focused on harms to the woman whose body may come to be so regarded. Nevertheless, the common ground is notable and important. Although they don't focus on it, both Bradley and George in the nineteen nineties, and Pope Pius in the nineteen thirties, lay the groundwork for clear arguments against instrumental and unwanted sex rooted in natural law thinking itself: they are opposed to instrumental sex, and much of the unwanted sex within marriage is instrumentally motivated, virtually by definition. I will return to this important point in my conclusions.

Bradley and George's *reason* for finding instrumental, unwanted, marital sex to be worrisome, however, like the Pope's earlier statement regarding the damage

⁵⁵ THE ETHICS OF CONSENT: THEORY AND PRACTICE 243 (Franklin Miller & Alan Wertheimer, eds., 2009); Robin West, *The Harms of Consensual Sex*, THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS 317 (Alan Soble & Nicholas Power, eds., 5th ed.) (2008).

⁵⁶ Pope Pius XI, *Casti Connubii*, Encyclical on Christian Marriage (1930), reconfirmed in Pope Pius XII, *Nature of Their Profession*, Allocution to Midwives (1951), and in Supreme Pontiff Paul VI, *Humanae Vitae*, Encyclical Letter on the Regulation of Birth (1968).

that might be done by men's unleashed desires, is clearly its instrumentality, and not its "unwanted-ness." That is, neo-natural lawyers might well object to unwanted marital sex engaged in for the purpose of securing domestic peace, or for financial support, or to meet community expectations, or to satiate a husband's physical sexual needs – I think they would so object – but they would object to all that unwanted marital sex (assuming they would) for precisely the *same* reason that they object to contracepted sex-for-pleasure or sex-for-money or sex-for-love: all of that sex – the sex for pleasure as well as sex for other ends -- is the instrumental use of the sexual body for ends other than what gives sex its moral meaning: the conjugal union of a man and a woman in a sexual act of the reproductive form. There is, in other words, at least in Bradley and George's account, a blanket condemnation of "instrumental" sex, and presumably that would include unwanted instrumental sex as well. What there isn't, though, in Bradley and George's account, nor in any of the Encyclicals (that I can find), is a blanket condemnation, or really any criticism at all, of *unwanted* sex "of the marital form" whether instrumental or not. And of course there is no discussion or recognition of the harms that unwanted sex might cause.

In fact, in a striking passage, Bradley and George argue very much to the contrary – that unpleasurable sex that is *not* instrumental, is not, therefore, wrong, and might even be morally required. Even infertile married couples who can't procreate and don't get any pleasure from sex nevertheless have a "reason" – meaning, a moral reason, rather than an instrumental reason, and thus, presumably, a *duty* – to engage in marital sex, *regardless* of both their infertility and their mutual lack of desire. Note, such a couple has no instrumental reason – either to procreate or for pleasure – to have sex at all. Nevertheless, Bradley and George suggest, they should have marital sex. Thus, at least un-pleasurable sex of the marital form, unlike unwanted sex engaged in for the instrumental reasons described above, is not only morally *permissible*, it may also be morally *required*.⁵⁷ Now, presumably -- although they don't say so -- if a couple has a moral reason to engage in sex that *neither* finds pleasurable and that presumably neither wishes to have, then they likewise have a moral reason to engage in sex that *is* desired and enjoyed by one party, but not the other. Given the necessity of a man's erection to penetrative vaginal-penile sex, the necessity of some form of desire to an erection, and the non-vaginal nature of female pleasure and orgasm (obviously all well known facts by the mid-1990s) a lack of desire for sex "of the marital form" by the woman, but not the man, is a far more likely scenario, than the jointly undesired sex Bradley and George describe, and prescribe. What Bradley and George implicitly argue, in other words, is that a couple has a moral duty to engage in even unwanted sex so long as it is non-instrumental, which sex of the marital form, definitionally, is not. While they don't say so explicitly, what this seems to suggest is that a wife has a moral duty to engage in sex which her husband may very much desire but which she does not desire, and which he might enjoy but from which she receives no pleasure.

⁵⁷ Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 305-306 (1995).

Does all of this unwanted sex cause harm? I have argued elsewhere, as have a handful of feminist legal theorists and more recently a number of social scientists as well, that unwanted sex – sex to which women consent but which they do not desire – carries with it a host of possible psychic and emotional and political harms. I will elaborate on those harms in the next section, and will suggest some reasons to worry that women in long term relationships, including marriage, that engage in such sex, may suffer more of those harms than women in short term relationships. I will defer a recitation of those harms to the next section below, where I will discuss the harms of unwanted consensual sex both inside and outside of marriage. My point here is narrower: the natural lawyers’ valorization of marital sex, on which their condemnation of birth control rests, seemingly endorses as morally salutary, and perhaps even morally obligatory, precisely this unwanted sex, so long as it is of the marital form. Again, that unwanted sex might be injurious – I will argue below that it is – and if so, then it might well be all the more injurious when inside long term relationships, such as traditional marriage, than outside it. Here, I just want to make clear that the natural lawyer’s conception of heterosexual morality is not just inattentive to those possible harms. It seemingly celebrates the sex that causes them.

There is, though, a third and much less contestable harm that is quite clearly occasioned by “sex of the marital form,” that I will elaborate here, and that is – oddly -- almost entirely untouched by the neo-natural lawyers’ contemporary critics. The natural lawyer’s valorization of procreative marital sex includes *all* marital sex, not only whether or not it’s wanted and perhaps whether or not its consensual, but also, and unambiguously, whether or not it leads to unwanted *pregnancies*. Marital sex, recall, at least for the modern popes, might be permissibly regulated through *natural* forms of birth control – meaning rhythm methods – but it must also always be open to at least the *possibility* of conception. That is, after all, its moral and natural point. Some of that sex will obviously be open to conception not only in form, but also in fact: thus, much of the procreative marital sex the natural lawyers celebrate will result in pregnancies and live births. And, some of those pregnancies – some sizeable subset of all the pregnancies that result from the marital sex that is valorized by natural lawyers – meaning, again, sex that is coital, procreative, and within marriage – might not be in the woman or her husband or her other children’s best interests, all things considered. Some of those pregnancies (whether or not wanted), might be a burden to the woman’s health or wellbeing, or to her education, her employment, or her employment prospects, or to the couple’s pocketbook. Those pregnancies might be objectively harmful, or at least costly, for any of those reasons. In addition, though, many of the pregnancies caused by marital sex, whether or not wise, are clearly not *wanted*, or desired, by the women who will bear them – as evidenced, in part, by the abortion rate for women in traditional as well as non-traditional marriages or relationships.⁵⁸ Yet, according to the neo-natural

⁵⁸ See Guttmacher Inst., Fact Sheet: Unintended Pregnancies in the United States (Feb. 2015), available at <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html> (stating that incidence of unintended pregnancies is twice as

lawyers, *all* marital sex, not only those sexual acts which lead to wanted pregnancies, but also those which lead to unwanted pregnancies, constitute an unassailable, natural, human good. A wife's desire for sex is generally not a condition for the morality of the sex that follows, as we've seen, but a desire to be pregnant is *likewise* not a condition either for the morality of the procreative sex itself, or for the morality of the pregnancy that follows the sex. A lack of desire to be pregnant may justify a decision of the couple to abstain from sex, *if* both partners consent to the abstention. For the modern popes, even a unilateral desire of the woman's to abstain from sex might be a sufficient reason to abstain, *if* the desire is "reasonable," and a desire to not be pregnant might presumably sometimes qualify as reasonable. But an unwanted pregnancy does not detract from the morally salutary nature of the sex, or from the morally salutary nature of the pregnancy, should she become pregnant in spite of her efforts not to. And of course it never justifies the use of artificial – and therefore effective -- birth control.

In contrast to the popes' and the neo-natural lawyers possibly shifting position on the morality of nonconsensual or unwanted marital sex, their position on *this* point is absolutely unambiguous and distressingly unchanging. The 1930, the 1951, and the 1968 Encyclicals are *all* quite clear on this point, as are the neo-natural lawyers' more contemporary elucidation of the position from the 1990s and 2000s.⁵⁹ In fact, both the Popes and the scholars emphatically insist on it. A pregnancy that is unwanted nevertheless ushers in a new life that must be welcomed, nurtured and celebrated. The pregnancy as well, then, must be welcomed, nurtured and celebrated, regardless of desire that runs to the contrary, regardless of whether that pregnancy endangers the woman or even puts her life at risk. So, then, must be the sex that caused it. Again, just to review the qualifications of this: recall the 1930 encyclical, which states that a couple *may* practice abstinence during the period in which they believe a woman is fertile (meaning, they may employ the natural rhythm method) and that they may do so for the purpose of avoiding conception. They may do so, however, only if *both* parties "consent" to this. It follows from the proviso – that they may abstain only if both parties consent to the abstention – that a wife's *unilateral* desire to abstain from procreative sex –her lack of desire for or even her lack of consent to procreative sex – is not sufficient grounds for abstaining: no to procreative sex might mean no, but it doesn't mean no

high for women outside of marriage as inside, but rate of unintended pregnancies within marriage is still quite high: 20 out of 1,000 women).

See generally Lawrence B. Finer & Mia R. Zolna, *Shifts in intended and unintended pregnancies in the United States, 2001–2008*, 104 AMERICAN JOURNAL OF PUBLIC HEALTH 43 (Supp. 2014).

⁵⁹ Pope Pius XI, *Casti Connubii*, Encyclical on Christian Marriage (1930), reconfirmed in Pope Pius XII, *Nature of Their Profession*, Allocution to Midwives (1951), and in Supreme Pontiff Paul VI, *Humanae Vitae*, Encyclical Letter on the Regulation of Birth (1968); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995); Germain Grisez, Joseph Boyle, John Finnis & William E. May, *Every Marital Act Ought to Be Open to New Life: Toward a Clearer Understanding*, 52 THOMIST 365 (1988)

sex, unless both parties agree to the no. Her husband has a veto over her abstention. In the 1968 Encyclical, the Pope indirectly endorses what he characterizes as a view held by “many men,” that a man should not impose sex upon his wife against her “reasonable wishes” – but it isn’t at all clear whether a *wish not to become pregnant* is always a reasonable wish, if he does not share it. These qualifications, however, of the duty to have marital sex pertain *only* to the rhythm method. Both Popes are quite clear that a desire to not become pregnant, even if both parties share it and even if it is entirely “reasonable,” and even if it is therefore sufficient to justify abstention, is not a sufficient warrant for the use of artificial birth control that will actually prove effective. To put this all together, a married woman, according to both Popes who have spoken in detail on the subject, has a moral obligation to have procreative marital sex she does not desire and from which she receives no pleasure, and then a further obligation to bear a pregnancy she does not desire, and which may threaten her life, her health, her pocketbook, or her family’s overall wellbeing. Because they do not address it, it is not at all clear whether contemporary natural law scholars, including Finnis, Bradley and George, would disagree.

What harms attend to all of those unwanted pregnancies? All pregnancies of course, certainly including intensely wanted ones, carry risks and costs, both to a woman’s health and to her mobility and employment.⁶⁰ Unwanted pregnancies, however, carry far more. Some of these risks and costs are well known. First, a lack of desire to be pregnant is surely oftentimes a sensible proxy for greater harms down the road: If a woman did not want the pregnancy because of health risks, those risks are obviously more likely to come to pass – unwanted pregnancies will tend to correlate with those pregnancies that are more health endangering and life threatening than intended and wanted pregnancies.⁶¹ Likewise, if she did not want the pregnancy because of worries about employment, then it is more likely than if the pregnancy were wanted, that the pregnancy may well cause an interruption in her work.⁶² If she did not want the pregnancy because she has too many children to

⁶⁰ Eileen McDonagh, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT*, (New York: Oxford University Press, 1996); Shari Motro, *Preglimony*, 63 *STAN. L. REV.* 647 (2011).

⁶¹ See Guttmacher Inst., Fact Sheet: Unintended Pregnancies in the United States (Feb. 2015), available at <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html> noting that births resulting from unintended or closely spaced pregnancies are associated with adverse maternal and child health outcomes, such as delayed prenatal care, premature birth and negative physical and mental health effects for children.

⁶²*Id.* The costs associated with unintended pregnancy would be even higher if not for continued federal and state investments in family planning services. In 2010, the nationwide public investment in family planning services resulted in \$13.6 billion in net savings from helping women avoid unintended pregnancies and a range of other negative reproductive health outcomes, such as HIV and other STIs, cervical cancer and infertility. In the absence of the current U.S. publicly funded family planning effort, the public costs of unintended pregnancies in 2010 might have been 75% higher. Total public

care for already, then again, it is likely that she was right to so worry: her mothering and her existing children may suffer. So will her engagement in educational, social, civic and cultural life. A lack of desire to be pregnant, in other words, is clearly a proxy for the familiar objective harms of pregnancy. And of course, a married woman's lack of desire for a pregnancy means that it may lead either to an abortion, in spite of whatever strong moral objections she may harbor to the procedure, or to an unwanted birth. Either outcome is harmful and in well documented ways.⁶³ A woman's lack of desire for a pregnancy, in other words, is a pretty good indicator that the pregnancy may be against her or her family's interest.

But an unwanted pregnancy might also carry less sizeable but less noted risks of psychic, emotional and political harms – harms which are independent of or in addition to the increased risks of whatever factors might have rendered the pregnancy unwanted. This hasn't been much studied, at least empirically: although there is a sizeable literature on the poor outcomes for the children who are produced from unwanted pregnancies, and a wealth of literature on both the financial costs and the risks to mental and physical health of unwanted pregnancies, there is surprisingly little reported empirical scholarship on the psychic, as opposed to physical or economic harms of unwanted pregnancy. There is though a wealth of anecdotal and autobiographical accounts, as well as some excellent philosophical accounts, of the nature and experience of unwanted pregnancy,⁶⁴ and from that base, some inferences seem fairly warranted regarding the psychic harms those pregnancies engender. Of course, an undesired pregnancy is obviously less joyful than a wanted pregnancy, and without that joy, the discomfort and sickness attendant to even much wanted pregnancies are significant psychic as well as physical harms. But there are other harms as well, less noticed, but equally important, that attach to an unwanted pregnancy, even if that pregnancy is medically unexceptional, and whether or not it leads to a live birth, miscarriage or abortion. I believe there are four, which I will first just list, and then comment on their significance.

First, and with or without morning sickness, and as Professor Eileen McDonough has carefully shown in her highly original and groundbreaking mid-nineties political and theoretical defense of abortion, titled *Breaking the Abortion Deadlock*, an unwanted pregnancy is *felt* by many woman to be an unwanted and

expenditures on unintended pregnancies nationwide were estimated to be \$21.0 billion in 2010. Of that, \$14.6 billion were federal expenditures and \$6.4 billion were state expenditures.

⁶³ Guttmacher, *supra* note 61. There are no uncontested long lasting harms of legal and safe abortions, but with the increasing number of legal restrictions on the availability of abortion, it is no longer safe to assume that abortions are either legal or safe.

⁶⁴ See, e.g., Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490 (No. 66-605) (hereinafter, "Voices Brief"); Eileen McDonagh, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT*, (Oxford University Press, 1996); Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011).

therefore assaultive intrusion into the body by the developing body, the interests, and the needs, of another human life.⁶⁵ An unwanted pregnancy, she argues, is often, and perhaps always, *experienced* by the woman who bears it as an assaultive invasion, and compromise, of her physical integrity: the attached fetus compromises the boundaries of her body as demarcating her separateness from others.⁶⁶ If she is right about that, and I think she is, one harm of an unwanted pregnancy is simply the compromise of a woman's *bodily integrity*. Second, and as a number of philosophers have argued in the different context of abortion rights, and somewhat analogously to the effect of a military draft on men's bodies, an unwanted pregnancy undermines a woman's *self-sovereignty*. It reorients the purpose of her body, both in her own perception, and that of others: her body is no longer a vehicle for the sustenance and nurturance of the woman's self. Her own body is no longer serving the very particular end of nurturing or sustaining her own soul, or her own mind, or her own mental and physical health, or her own activities, or her own *raison d'être*, or her own passions, or her own mission, or her own self-perceived point of being in the world. Her body becomes the vehicle for the sustenance, nurturance, and facilitation of somebody else.⁶⁷ So, this is the second harm: what I will call a compromise of self-sovereignty. Third, and as a number of legal scholars as well as philosophers have argued, an unwanted pregnancy robs the pregnant woman of some measure of *autonomy* – it limits her freedom of movement and her range of choices and options, sometimes quite severely, which, again, is obviously a harm.⁶⁸ And lastly, an unwanted pregnancy is quite literally *alienating*, in a traditionally Marxist or labor-oriented sense: an unwanted pregnancy carried to term dictates not only what a woman's body is for (thus compromising self sovereignty), and what she can do with it (thus limiting her autonomy) but also to what end her future labor will be dedicated.⁶⁹ Her future labor (including both the labor of the birth itself and her future maternity) as well as her present body must be dedicated, not

⁶⁵ Eileen McDonagh, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 90-91, (Oxford University Press, 1996); Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011).

⁶⁶ McDonagh, at 47.

⁶⁷ This is portrayed vividly in Judith Thompson's famous metaphor for an unwanted and nonconsensual pregnancy, of a woman being forcibly tied to a born person, who will perish without the woman's relinquishment of the use of her body for the purpose of his sustenance. Judith Jarvis Thompson, *A Defense of Abortion*, J. PHIL. & PUB. AFF. 1 (1971).

⁶⁸ Voices Brief, *supra* note 64; Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012).

⁶⁹ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012); Susan Okin, *JUSTICE, GENDER, AND THE FAMILY* 83 (Basic Books, 1989); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH L. REV. 1569 (1979); Judith Jarvis Thompson, *A Defense of Abortion*, J. PHIL. & PUB. AFF. 1 (1971).

to her own ends, but to the health of the fetus and then the well-being of the child.⁷⁰ The relatively unstudied psychic (and political) harms of unwanted pregnancy, then, entirely aside from the familiar litany of financial and physical costs, are at least fourfold: an unwanted pregnancy compromises a woman's physical integrity and her self sovereignty, and it limits her autonomy and her destiny in ways which ought to be easily recognized, at least by legal and labor scholars, as peculiarly but profoundly alienating.

Of course, a fully *wanted* pregnancy *also* compromises a woman's physical integrity and self sovereignty, and limits her autonomy and destiny – limits the profundity of which often come as a bit of a shock, even to women who fervently desire their pregnancies. But where a pregnancy is *wanted* those limits can be fairly characterized – and are often experienced -- as a longed-for communion, mingling, or expansion of a woman's own egoistic ends so as to include those of another human life. A wanted pregnancy is a complex and extended and quite profound physical act of *sharing*, and might well be emotionally and spiritually uplifting for that very reason, despite the attendant risks and harms. A wanted pregnancy is, in effect, a desired -- sometimes intensely desired -- departure from the atomizing and hyper-individuating norm of liberal selfhood.⁷¹ As such, I have argued elsewhere as have a number of others that the experience of wanted pregnancy constitutes a significant counter-example, both in theory and in life, to the valorization of atomistic individualism so central to liberal theory and to economic life in liberal market economies.⁷² An *unwanted* pregnancy, however, and by contrast, compromises the pregnant woman's physical integrity, her self-sovereignty, her autonomy, and her destiny, and does so in ways that are essentially assaultive rather than communal, and in ways that are anything but morally enriching. The fetus takes from, rather than shares with the woman. Her will and her heart are not in it. Both the fetus and the potential child enslave and threaten rather than enrich her future. An unwanted pregnancy, in other words, exploitatively, rather than communally, defines a woman's body and her future labor as existing for the sake of another, rather than for her self. Whether a pregnancy constitutes a profound and poignant counter to liberal individualism, or an injury that liberalism ought to cleanly recognize as harmful precisely because of its forced illiberalism, is entirely a function of whether or not it is wanted. Liberals ought to be interested in the project of understanding the psychic harms of unwanted pregnancy for that reason alone.

For a number of reasons already noted, the financial, physical, mental and particularly the psychic (and political) harms to women that are consequent to unwanted pregnancies, and that are themselves the natural and fully foreseeable

⁷⁰ This is the focus of the justly famous article by Andrew Koppelman on unwanted pregnancy as slavery; see also Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

⁷¹ ROBIN WEST, *Toward a Jurisprudence of the Civil Rights Acts, in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY* (Samuel Bagenstos & Ellen Katz eds., University of Michigan Press 2014).

⁷² *Id.*

consequence of uncontracepted sex, both marital and non, have not been made particularly visible in the most recent wave of legal and political commentary triggered by struggles over the birth control mandate in the Affordable Care Act, culminating in the *Hobby Lobby* decision itself. Again, this is at least in part because of the legal construction of the issues, as discussed above: *Hobby Lobby* in particular marginalizes arguments for and against birth control, and therefore marginalizes discussion of the harms those arguments might bring in their wake. Again, as discussed above, one would never know, reading *Hobby Lobby*, that the *fully intended* consequence of limiting access to birth control, at least according to the conception of sexual morality held by the most thoughtful advocates of that goal, is not only to limit licentious sex, but *also* to forbid the control of fertility that birth control facilitates, and to do so, in part, because of a felt desire to valorize even unwanted pregnancies, as well as the live births to which those pregnancies lead, so long as that sex is marital. That marginality is consequential. It pushes to the margins not only the valorization of the sex that causes unwanted pregnancies, but also the harms borne by the women who suffer them. Again, part of the reason for that marginality is the “exit right” logic of the right recognized in *Hobby Lobby* itself: arguments against birth control are contained within the RFRA right of exemption, with the consequence being that it is and feels violative of religious liberty to even venture a discussion of them, much as it is and feels violative of the privacy right constructed in *Griswold* through *Roe* to venture a discussion of the reasons women might have for wanting to get abortions.

But the phenomenon is broader and the silence is deeper than anything that can be pinned on *Hobby Lobby* standing alone. Most striking, the silence extends to the scholarly as well as advocacy community. Why *aren’t* we, in the wake of *Hobby Lobby*, talking about, and subjecting to criticism, the natural lawyers’ valorization of the sex, both wanted and unwanted, that leads to unwanted pregnancies? More generally, why aren’t we talking about the harms of unwanted pregnancy? Isn’t that what’s at stake, largely, in *Hobby Lobby*? Isn’t that the cost of the religious freedom that opinion seeks to protect? There it sits – the cost to women of this exemption -- but we don’t touch it – we, meaning all us liberal, feminist, pro-sex, modernist and postmodernist critics. Again, let me emphasize just the sheer oddity of this. There is a sizeable body of literature, some of it legal, some empirical, on the correlation of unwanted pregnancies with bad outcomes for the children who are nonetheless borne of such pregnancies: the children who are borne from unwanted pregnancies seem to disproportionately suffer bad health outcomes, lower levels of educational attainment and future criminal propensities.⁷³ And, there is a well-established body

⁷³ See Guttmacher Inst., Fact Sheet: Unintended Pregnancies in the United States (Feb. 2015), available at <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html> Unintended pregnancy rates are highest among poor and low-income women, women aged 18–24, cohabiting women and minority women.

Poor women’s high rate of unintended pregnancy results in their also having high rates of both abortions (52 per 1,000) and unplanned births (70 per 1,000). In 2008, poor women had an unintended birth rate nearly six times as high as that of higher-income women (at or above 200% of poverty.) In 2008, women without a high school degree had the highest

of research on both the financial costs and the risks to women's mental and physical health occasioned by unwanted pregnancies.⁷⁴ And of course, there is a sizeable body of critical commentary on the neo-natural lawyers' conception of sexual morality, particularly on its condemnation of same-sex sexuality, marriage, and parenting, as well as of all non-procreative sex generally. But that critical commentary, both before and after *Hobby Lobby*, has focused overwhelmingly on the constraints on sexual liberty, rather than the loss of control over fertility, that restrictions on the legality or availability of birth control would entail. From the existing critical and scholarly legal literature on the neo-natural lawyers' conception of sexual morality alone, one would almost undoubtedly get the profoundly false impression that the most dire or most unfortunate consequence of limiting access to birth control, is that so doing would clamp down on sexual liberty. That it also would limit a woman's control of her own fertility – and that it would do so because its most thoughtful advocates explicitly celebrate the intrinsic moral worth of all marital sex, including marital sex that leads to unwanted pregnancies, as well as the moral worth of those pregnancies themselves -- warrants barely a mention.

Now: *why*? Why has this prong of the natural lawyers' brief – that marital sex that leads to unwanted pregnancies is an unalloyed intrinsic, human, natural, good – not attracted a more vigorous response from the neo-natural lawyers' contemporary critics? This is clearly something of a modern phenomenon, meaning it was not always the case: in the first two thirds of the twentieth century, it was *precisely* this aspect of the natural lawyers' brief that was most vigorously criticized, both by feminist, public health, and liberal advocates for the legalization of birth control. And, over the last ten years, the claim that traditional marriage is a *necessary* condition of an intrinsically good pregnancy, and of morally salutary child-raising, has received quite a bit of critical attention, primarily from advocates of same sex marriage or of gay and lesbian parenting, and for good reason.⁷⁵ It is certainly reasonable – even plausible -- that two committed parents in a life-long relationship is a highly desirable (although by no means necessary) background condition for ideal child-raising. Put the other way around, it is not at all clear that either traditional marriage or traditional means of conception are necessary for the morality of a pregnancy: the apparent goodness of marriage, for children, may simply reside in the commitment of the co-parenting partners to each other and their children, and the familial stability, as well as the social and economic benefits

unintended pregnancy rate among all educational levels (101 per 1,000 women aged 15–44), and rates were lower for women with more years of education.

⁷⁴ *Id.*; *Unintended Pregnancy Prevention*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 12, 2013) available at

<http://www.cdc.gov/reproductivehealth/UnintendedPregnancy/> (nothing that unintended pregnancy is associated with increased health risks because the woman may not in optimal health for childbearing or may delay vital prenatal care).

⁷⁵ See CARLOS BALL, *SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW* 76-78 (2014).

that follow that status.⁷⁶ Similarly, plenty of ethicists, liberal feminists, libertarians and public health scholars have argued that pregnancies that result from either in vitro fertilization or surrogacy arrangements are not only morally permissible, but also worthy of celebration, either in or outside of marriage, and they are so no less than are the pregnancies conceived through sex of the marital form.⁷⁷ I don't mean to deny that this part of the natural lawyer's brief – that marriage is a necessary condition for the morality of a pregnancy-- has gone entirely unnoticed. What contemporary legal critics have *not* focused on, however, is parallel to what they have not focused on in the realm of sex itself: they have not focused on the natural lawyers' claim that the marital form is a *sufficient* condition not only for the morality of unwanted sex, but also for the morality of that sex, whether wanted or not, that leads to unwanted pregnancies: the claim, that is, that so long as sex is marital, the pregnancies that follow, whether wanted or unwanted, are as much an intrinsic good as the sex itself.

So, why is this? Why has the natural lawyer's endorsement, and even celebration, of the intrinsic worth of the sex that leads to unwanted pregnancies not been subjected to greater critical scrutiny? Surely, one reason may simply be because of a widespread belief that today the argument lacks practical significance: the natural lawyers have just flat-out lost this argument, critics might think, in the court of public opinion, which is really the only court that matters. Or so we are told. Catholic women, after all, use birth control in the same large numbers as non-Catholic women, and do so in open defiance of the Catholic leadership's counsel, and women with unwanted pregnancies, both in and outside of marriage, and again both Catholic and non-Catholic, also terminate those unwanted pregnancies that occur in spite of the use of birth control through abortions in large numbers. The availability of abortion and the widespread use of birth control may render the harms occasioned by unwanted pregnancies seemingly trivial, and therefore marginal – something that perhaps once was a problem but simply is no longer.

If this is what is grounding the natural lawyers' critics' relative lack of attention to the problems and harms attendant to unwanted pregnancy – that it no longer much of a problem – the wisdom of that reticence should be re-thought, I

⁷⁶ See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (Oxford University Press, 2014).

⁷⁷ See LORI B. ANDREWS, *BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, AND BRAVE NEW BABIES* 160 (Harper Collins, 1989) for a support of surrogacy as an exercise of free choice as “feminist opponents of the practice have relied on paternalistic theories and speculative information about risks to women and children...”; Lori B. Andrews, *Remaking Conception and Pregnancy: How the Laws Influence Reproductive Technology*, 9 *FRONTIERS: A JOURNAL OF WOMEN STUDIES* 38 (1986) discussing constitutional protection of private family decisions and the woman retaining control over her genetic material provides reasons to allow access to new reproductive technologies); ANDREA L. BONNICKSEN, *BUILDING POLICY FROM LABORATORIES TO LEGISLATURES* 6 (Columbia University Press, 1989) for an analysis of safe practices for in vitro fertilization and the effect of expansion on free choice.

hope for obvious reasons. Almost *half* of all pregnancies in this country are unwanted, and about a third of all pregnancies – meaning over half of all unintended pregnancies -- end in abortion.⁷⁸ Those are staggering and staggeringly depressing numbers, no matter what one's views on abortion – or rather, they are, *if* one grants the harmfulness of unwanted pregnancy. And, most of those unintentional and unwanted pregnancies occur, furthermore, because of the nonuse or misuse of birth control: women who use birth control regularly account for only a sliver of the number of women who suffer from unwanted pregnancies.⁷⁹ Moral arguments against birth control likely account for a substantial (but specifically unknown) part of that nonuse: the natural lawyer's brief against birth control has now received a sympathetic hearing in fundamentalist protestant faith traditions, whose practitioners increasingly both decry and eschew the use of birth control. More significantly, though, those moral arguments against birth control underlie the push for abstinence-only programs, rather than promotion of birth control, and for abstinence only instruction, rather than instruction in the use of birth control, in sex education classes in middle and high schools. If the harms of unwanted pregnancies – and hence the harms of marital sex, as defined and celebrated by natural lawyers - - are real, then the natural lawyer's moral brief against birth control, and the conception of heterosexual sexual morality that valorizes both the sex within marriage and the unwanted pregnancies to which it leads, on which that brief is based, obviously matter.

There may, though, be less obvious reasons as well, for the reticence of the natural lawyers' modern critics to address these harms, entirely aside from the belief, which I think is misguided, that the argument is just too discredited to matter. The first is the sizeable but unacknowledged shared ground between the pro-sex commitments of the natural lawyers and their most prominent critics. Pregnancy, whether wanted or not, according to the natural lawyers, is a consequence of the intrinsic goodness of a particular kind of *sex*, which, although narrowly defined, is, after all, still, nevertheless, *sex*. The problem with that moral endorsement, from the perspective of the natural lawyers' most prominent contemporary critics, is *not* that the sex that is endorsed leads to unwanted and harmful pregnancies.⁸⁰ Rather, the problem with the natural lawyer's endorsement of marital sex that has so captured the attention and imagination of the natural lawyers' critics, is that it comes alongside of a condemnation of all other – all non-marital -- sex. But the endorsement of marital sex *itself* gets a pass, as well as the unwanted pregnancies to which it leads. One reason for this may be that the natural lawyers' critics, no less than the natural lawyers themselves, have been remarkably inattentive to the harms of the forms of sex *each* side of this divide endorses: the natural lawyers are inattentive to the harms of marital sex, and their critics are inattentive to the harms

⁷⁸ Guttmacher Inst., Fact Sheet: Unintended Pregnancies in the United States (Feb. 2015), available at <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html>

⁷⁹ *Id.*

⁸⁰ Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995).

of non-marital sex. What the natural lawyers and their critics may share, then, is a partial blindness to the harms of the sex each side endorses: for the natural lawyers, of marital sex, and for their critics, and as I will discuss below, of virtually all sex, whether or not it is marital, so long as it is consensual. But that obviously includes marital sex. This is obviously speculative on my part. But nevertheless, it can't just be a coincidence or insignificant that the natural lawyers' critics – many of whom call themselves proudly “pro-sex” and are always alert to the harms done by the demonization of sex, are inattentive to the harms caused by the unwanted pregnancies that are themselves caused by sex: an activity that the critics, certainly no less than and considerably more than the natural lawyers themselves, generally celebrate.

Second, many would-be critics on all sides of this debate, I suspect, tend to regard pregnancies that result from sex in which the parties *knowingly* fail to use birth control, and thus knowingly assume the risk of the unwanted pregnancy that may result, as an “intentional” or at least quasi-intentional pregnancy: the pregnancy is the result of an act in which parties engaged, knowingly accepting the risk of its probable consequences. This seems clearly true, for example, of women in traditional marriages who are morally opposed to the use of artificial birth control and try, but fail, to control their fertility solely through rhythm methods: if such a woman becomes pregnant, the critic might reason, she's laid her bed so now she must lie in it. Her problems, or injuries, are not of concern, from a liberal perspective. The same might be thought of women, whether married or not, who don't wish to become pregnant, and know full well how birth control works, and certainly have no moral objection to it, but carelessly or recklessly fail to use it. Both groups of women in some sense have knowingly assumed a risk of pregnancy. For both groups, the unwanted pregnancy that results can fairly be regarded as “consensual.”⁸¹ And, for a host of reasons I've discussed elsewhere⁸² but which are beyond the scope here, modern legal scholars generally have difficulty seeing that unwanted albeit intentional, fully consensual acts – acts that are almost invariably legal precisely because of their consensuality -- can nevertheless cause harms. We may be inclined to assume, then, that all such consensual albeit unwanted pregnancies – pregnancies in which the risk of conception was consciously assumed -- like all such consensual acts, can't really cause *harm* to those who intended them, anymore than the purchaser of a lottery ticket can be said to have been harmed by his payment of the purchase price, when the lottery ticket turns out not to be a

⁸¹ For an argument that they are better understood as nonconsensual, see Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent*, (New York: Oxford University Press, 1996).

⁸² Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384(1985); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 Harv. L. Rev. 1449 (1986); ROBIN WEST, *Sex, Law and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* (Franklin G. Miller & Alan Wertheimer, eds., Oxford University Press, 2010).

winner.⁸³ To assume otherwise, the argument continues, would be unduly paternalistic: the woman had herself assessed the risk of the pregnancy and had the sex anyway, so she must have herself calculated that the risk of the pregnancy times its cost was simply outweighed by the value of the sex that might cause it. Who are we to second-guess her? If so, then while the unwanted pregnancy may impose a cost, it can hardly be said to impose a *harm*: it is a cost for which she was fully compensated by the pleasure of the sex that brought it about. Thus – the harms of unwanted pregnancies simply disappear, behind the veil of the apparently consensual assumption of their risk.

More generally, though, we may, because of a culture-wide bit of cognitive dissonance – and not just because legal scholars are overly-besotted by economic definitions of value -- simply fail to see that intentional and fully consensual acts can impose harms, because we don't fully understand that we often intend to bring about states of affairs we don't ourselves want, and we all may *particularly* fail to see this – even semi-consciously refuse to see this -- with respect to women's intentional use of their bodies. As a consequence, if I'm right about that, we may fully understand that truly *unintentional* pregnancies – such as pregnancies where birth control is used but fails, or pregnancies that follow a rape, or pregnancies that occur where birth control is unavailable, or where the parties suffer a profound ignorance regarding its necessity -- impose cognizable harms. What we may not well understand, by contrast, is that consensual (or intentional) but nevertheless *unwanted* pregnancies, where the risk of an unwanted pregnancy is at least dimly but nevertheless consciously assumed, either in or outside marriage, and whether that risk is consciously assumed either because of duty, or because of moral objections to birth control, or by virtue of pressure from a partner, or from peer pressure -- *also* carry with them grave harms. And, one reason we might not see this is that we have yet to understand that such a category might exist: that we sometimes intend to bring about states of affairs we don't want. And, we may have a particular blind spot – I think we do – when faced with the possibility that women may do this frequently, and may do so, in fact, *very* frequently with respect to our bodies: “our bodies” that, fifty years after that the publication of that book with that hopeful and buoyant title, we still don't quite see as “our selves.”

Why might that be the case? Least charitably, and of course fully speculatively, the psychic or emotional harms occasioned by intentional but unwanted pregnancies may elide notice simply because the use of women's bodies for reproductive or sexual ends that are disjoined from women's own desires strikes us all, and not just natural lawyers, as an acceptable distribution of societal resources, or as central to a laudable understanding of femininity, or both, at least so long as the pregnancy can be characterized, somehow, as at least nominally intentional. A woman who sacrifices her own interests, career, pleasures, self

⁸³ The example is taken from Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980), and criticized in Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384(1985).

sovereignty, autonomy, and integrity for a pregnancy she does not want is, after all, at least on one interpretation, simply engaging in a distinctive form of altruism – an altruism that might well be distinctively *unchosen* (even if the risk of it was consensually assumed) and hence distinctively *illiberal*, as well as distinctively *female*. A woman who bears an unwanted but consensual pregnancy has not *decided* to share her body with that of another and then taken actions that will allow her to do so, as we might at the end of the year decide to share our income with others in need, and then write the checks that enable us to do so. She has, rather, assumed a risk that something she does not want – a pregnancy – might follow from an act she may engage in – sex. The result – the pregnancy – forces her into an altruistic sharing of her body's resources. Again, women who do this routinely and as a matter of self-identity or self-definition, are thus engaging in a form of altruism that is both distinctively *female* and distinctively *illiberal*. That is just not a coincidental pairing. The identification of female (rather than male) altruism with *unchosen* and sometimes forced sharing, rather than with chosen giving, is a deep one. For a very long period in human history, in fact, that distinctive mode of ethics – forced altruism, particularly forced altruism regarding the body's resources -- has been a large part of what has defined not just femininity, but also, and more specifically, the deep incompatibility of femininity with liberal ways of being in the world.

And, that forced sharing – that feminine, unchosen, physical altruism -- is right at the heart of the natural lawyers' conception of femininity, of family, and ultimately of their opposition to birth control. Thus, female sacrifice (up to and definitely including the sacrifice of life itself) is explicitly and emphatically praised in the 1930 encyclical – a woman who passively sacrifices her health and perhaps her life for the sake of an unwanted pregnancy is to be much admired, but certainly not pitied – she will, after all, receive her reward for her sacrifice in heaven -- while the woman who willfully seeks to avoid a pregnancy or end one because of health or life is to be condemned as having committed a grave sin. Continuing through to today, this particular form of forced altruism, again explicitly for the natural lawyers but likely in some form implicitly for many of the rest of us as well, is simply part of what it means to be a *wife*. A wife just is someone who engages in physical altruism, and who does so by virtue of status rather than consent. But whether or not that's a matter of common understanding, this understanding of what it means to be a "wife" is quite explicit in the encyclicals, and it might be implicit in the neo-natural lawyers' failure to recognize the harms of unwanted pregnancy as harms at all, and thus to temper or condition their valorization of marital sex. The same set of assumptions, however, might also haunt, and limit, the critical literature on the neo natural lawyers' conception of heterosexual morality.

Whatever the reason for it, though, the lack of attention of both the natural lawyers and their critics to the harms caused by all of those unwanted pregnancies that are themselves caused by marital sex – meaning, again, procreative, uncontracepted sex of the marital form -- is just flat-out odd. It's peculiar. Until recently – maybe until the latest wave of birth control litigation -- it was widely understood that the very *point* of birth control is to limit the number of unwanted pregnancies, and that a major cost of the constraints on the availability of birth

control, whether resulting from exemptions grounded in RFRA, or because of taxpayer dollars going instead to ineffectual abstinence-only campaigns, or because of budgetary cutbacks in public health programs both in the schools and the larger communities, is that the number of such pregnancies would rise, *and that* surely that would be a bad thing. As we move into a world in which some women but not others have access to birth control, greater understanding of its point and knowledge of its effectiveness, and greater choice among its forms, we will thereby be moving into a world not only of unequal sexual freedom, but also of unequal control of fertility. In such a world more women will have unwanted pregnancies, whether intended or not. And, perhaps it needs saying although it shouldn't, most of those women who will bear those unwanted pregnancies will be poor. This is a harm, which we should reckon.

To sum this up: as is now fairly widely acknowledged, marriage is not a necessary condition for the morality of any and all pregnancies that may result from sex. This part of the natural lawyer's conception of sex has been widely criticized, and our law, our politics, and our legal attitudes all reflect that rejection. We don't any longer stigmatize illegitimacy, or sequester our pregnant and unmarried daughters, or emblazon scarlet letters on unmarried pregnant women's dresses or foreheads. We celebrate the in vitro or surrogacy pregnancies sought and treasured by both our straight and gay friends, partners, and selves. What has not been so widely criticized, because it is so rarely discussed, is the natural lawyer's valorizing claim that marriage is also a sufficient condition, not only for the morality of the unwanted sex that takes place within it, but also for the wanted or unwanted sex that leads to unwanted pregnancies that are its natural and completely foreseeable result. But this claim too is wrong and even clearly wrong. It is surely wrong to valorize nonconsensual sex – meaning rape -- within marriage, and I have argued elsewhere and will argue below that it is wrong as well to valorize unwanted sex, both marital and non-marital. But it is also wrong to valorize the marital sex, whether wanted or unwanted, that may lead to unwanted pregnancies. Whether inside or outside marriage, a wanted pregnancy is of far greater moral value – it is more joyous, it is less harmful, it is less costly and it is more emotionally and spiritually uplifting – than an unwanted pregnancy. The ideal conditions for a pregnancy are straightforward enough and widely understood: a pregnancy should be supported by loving parents-to-be, the pregnant woman should be in good health, there should be ample and planned provision for the child's nutrition, housing and schooling, and there should be substantial time in both parents' lives to devote to the work of child-raising. But as a *moral minimum*, a pregnancy, like sex, should be wanted. It should be desired. It should be celebrated by the woman herself and welcomed by her partner. The natural lawyers' celebration of the morality of all marital sex, including the marital sex that causes unwanted pregnancies, fails to recognize this moral minimum.

What to do about this? As I will suggest in the Conclusion below, one limited reform that might be amenable to natural lawyers would be a friendly amendment to the underlying conception of sexual morality that motivates the condemnation of birth control, so as to at least acknowledge that either a woman's or man's lack of desire for sex should be understood as a moral condition for marital sex. Marital sex

should be mutually wanted, and *any* reason for not wanting it, including both the woman's (or man's) lack of desire for the sex, but also the woman's (or man's) lack of desire for the pregnancy that might follow, should be honored. Another way to put it, perhaps, is that a woman's lack of desire to be pregnant should be regarded as irrefutably a reasonable one, and her lack of desire for sex that might cause it should be likewise so regarded, and honored. Any conception of heterosexual morality, including the natural lawyer's, should incorporate such a condition. The bottom line, morally, would just be this: don't have un-contracepted sex, if you don't want *either* the sex *or* the pregnancy that might follow. The rhythm method, in other words, should be regarded as not just morally permissible, but morally required. A recognition of this moral constraint alone would go some way toward lowering the incidence of unwanted sex and unwanted pregnancy both.

A second and more ambitious reform, though – a less friendly amendment -- would be to loosen the prohibition on artificial birth control. The use of birth control makes it somewhat more likely that all of the conditions of an ideal pregnancy are met, but it virtually guarantees one such condition: its use makes it far more likely that a pregnancy will be *desired*. That is, after all, its *point*. Birth control doesn't simply facilitate unfettered recreational or affective sex. What birth control does, is make wanted pregnancies more likely, and unwanted pregnancies less likely, for healthy and unhealthy women alike. It reduces the profound harms done, to women, by unwanted pregnancies. For that reason alone, the natural lawyers are wrong to oppose its use and the natural lawyers' critics are wrong not to hold them accountable for doing so. And, the government is most assuredly wrong not to highlight – even insist -- that the prevention of *these harms* – the harms done by an unwanted, whether or not intentional pregnancy, and whether or not it would undermine the woman's health -- is indeed the primary and moral *point* of birth control: it is the reason most people use it, and it is *why* the state has a compelling interest in seeing to it that they can access it. Whatever the harms and costs that have been visited upon us by virtue of the invention of reliable artificial birth control, this contribution to the quality of our lives is profound: birth control promises, and delivers, what nineteenth century feminists -- who generally opposed it, primarily because they thought that within a patriarchal context it would be ineffectual -- called "voluntary motherhood."⁸⁴ Motherhood, which they honored and quite genuinely valued – should *never* be involuntary. With birth control, a heterosexual woman whether within a traditional marriage or not has the power to only become pregnant when she wants to have a child. Marriage, that promises so much of value for our lives, can't promise that.

c. *The Sexual-Libertarian Brief for Birth Control*

The libertarian brief for the use and dispensation of birth control, like the natural lawyers' argument against it, also rests on a particular -- but of course very

⁸⁴ LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* (Urbana & Chicago: University of Illinois Press, 2002).

different -- conception of heterosexual morality. *All* sex, according to the sexual libertarian, including all heterosexual sex, is an intrinsic human good, and a good to which all individuals are entitled, so long as the sexual transactions that facilitate it are fully consensual acts, and are therefore conducive to, as well as a product of, individual autonomy. The formal parallelism of this conception with the natural lawyer's conception is striking. The sexual libertarian, like the natural lawyer, believes that sex is intrinsically good so long as it is (x), but while for the natural lawyer, that (x) is, broadly, marriage, for the sexual libertarian, that (x) – the condition for the morality of sex – is *consent*, or, broadly, autonomy. For the natural lawyer, sex must be of the reproductive form – and therefore marital -- to be moral, and and for the sexual libertarian, sex must be consensual – and therefore conducive to autonomy – to be moral. And, as was true of the natural lawyer's, the libertarian's conception of sexual morality quite cleanly breaks down into both a censorial and a valorizing claim, and again, as was true of the natural lawyer's, both the censorial and the valorizing claim are foundational to their argument regarding the use of birth control.

The sexual libertarian's censorial claim is this: Sex that is *not* consensual is immoral, because it interferes with human autonomy, and, because of liberal legal reforms of the last thirty years, it is increasingly likely to be illegal as well: in liberal reform jurisdictions, nonconsensual sex is rape, and it is rape regardless of whether or not a woman resisted to the utmost, or whether physical force was employed, or whether or not the victim was a sex worker, or whether she was black or white or brown, or whether the parties were married, knew each other, or were out on a date. But more fundamentally, whatever the reach of the law, non-consensual sex, in the "liberal imagination," is clearly *wrong*, because it interferes with autonomy, just as is nonmarital sex, to the natural lawyer, including contracepted sex within marriage, because of its interference with the fusion of body and spirit necessary to the actualization of the moral good of marriage. Again its worth noting the parallelism with the natural lawyer's censorial claim: for the natural lawyer, sex that is not marital is therefore immoral, for the libertarian, sex that is not consensual is what we should condemn.

The sexual libertarian's *valorizing* claim is just this: Sex that *is* consensual is not only "not rape," and not immoral, but it is also conducive to autonomy, and because it is conducive to autonomy it is an intrinsic human *good*. Consensual or autonomous sex (hereinafter, "autonomous sex," for short) is not simply permissible; it is of great positive value. Autonomous sex should be celebrated, then, (not just permitted) and in all its forms and varieties. Its moral value is not dependent upon any further conditions. It clearly doesn't have to be procreative, either in form or fact; it doesn't have to be open to the blossoming of a new life, it doesn't, therefore, have to be non-contracepted. It doesn't have to be heterosexual, missionary, penile-vaginal or penetrative. It doesn't have to be reproductive, marital, or emotive. It doesn't have to have any particular form, or motive, or end. It doesn't have to be within a committed long-term relationship, or any relationship, and it certainly doesn't have to be within marriage. It can also be – although it doesn't have to be – instrumental toward some end other than the pleasurable or reproductive consequence of the sex itself: it can be enjoyed or traded for money,

for security, for friendship, or for love, no less than for pleasure. Sex is not though, *simply* a commodity, the trade of which is conducive to wealth. Rather, within the libertarian conception, and certainly within the libertarian imagination, autonomous sex, like speech, belief and association is not *just* a source of wealth and it is not *just* a source of pleasure. It is also a source of meaning, of expression, and of individual identity.⁸⁵ It is a part of the inalienable liberty to which we are entitled as a matter of birthright. In short, we have a human right to it, and at least post *Eisenstadt* and all the more emphatically since *Lawrence*, we seem to have a constitutional right to it as well.⁸⁶ So long as it is consensual, sex, according to the valorizing prong of the liberal conception, whether or not it is hetero, missionary, or vaginal-penetrative in form, and whether or not it is for pay, for pleasure, for reproduction, or otherwise, is a great human good. Consensual sex is of positive human value, at least to the participants and possibly to the rest of us as well.

How do these claims jointly ground the libertarian brief for birth control? They overlap, but nevertheless, each claim supports a different part of the total argument. The right to *use* birth control, free of the constraining and condemning arm of the state – the right essentially created in *Griswold* and *Eisenstadt* – follows directly from a combination of traditionally liberal or Millian arguments regarding the moral limits on state power over acts that impose no harms on third persons, with the content – and limits -- of the sexual libertarian’s censorial claim. Heterosexual sex is wrong, according to the sexual libertarian, if it is nonconsensual, but *only* if it is nonconsensual: if it is nonconsensual, it is assaultive, and like all assaults by definition imposes harms. Therefore, consensual (and therefore non-assaultive) but non-procreative and hence contracepted sex, no less than consensual and therefore non-assaultive but procreative sex, or sex for pleasure, or sex for love, or sex for companionship, or sex for money, is just not in the category of the kinds or forms of sex, or any other kinds of victimless acts, which we should censor or condemn. The use of birth control, then, is not an affirmative moral wrong. We shouldn’t criminalize it obviously; but nor should we criticize it; there’s really nothing to criticize. There’s no sensible moral argument against its use. *Eisenstadt*,

⁸⁵ David A.J. Richards, *Sex, Drugs, Death, and the Law: An Essay on Human Rights and Overcriminalization* 41 (1986) (“Such activity is clearly a natural expression of human sexual competences and sensitivities... To deny the acceptability of such acts is itself a human evil, a denial of the distinctive human capacities for loving and sensual experience without ulterior procreative motives-in a plausible sense, itself unnatural”); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (Berkeley: University of California Press, 1998). But see Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

⁸⁶ See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2002-2003 CATO SUP. CT. REV. 21-41., for a critical reading of the sexual libertarianism explicit in *Lawrence*, see Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1629 (2004) for a discussion of how the Court vindicates sexual liberty by recognizing heterosexuals’ sexual rights and extending that liberty to lesbians and gay men., sometimes to the detriment of safety.

of course, constitutionalized a part of this claim, albeit obliquely.⁸⁷ If constitutional privacy protects anything at all, it should protect the use of birth control: it is a paradigmatic instance of self-regarding behavior that is both central to identity and inflicts no harms on others.

The argument for the accessibility and *dispensation* of birth control, however – rather than just for its decriminalization -- obviously doesn't and can't follow from the libertarian's censorial claim alone: that the use of contraception (and contracepted sex) is not a moral wrong, and should not be a legal wrong, might imply that we should not criminalize it and should perhaps constitutionalize a right to it, but it obviously doesn't follow from the limits of the censorial claim that birth control is such a good thing that it should be made broadly available, through mandatory insurance schemes or otherwise. The argument for the dispensation of birth control (rather than just its legality), however, *does* follow, and quite directly, from the libertarian's valorizing claim regarding the high positive value of autonomous sex. Because autonomous sex is an intrinsic human good, anything that *liberates* autonomous sex is of value, and anything that confines it, is a cost. Pregnancy and the fear of pregnancy obviously greatly inhibit heterosexual sex and sexual expression. Birth control frees us from those fears and consequences, and thus frees heterosexual women and men both for the autonomous sex, sexual expression and sexual pleasure to which we are all entitled.⁸⁸ Birth control, in short, is facilitative of sexual liberty.⁸⁹ Therefore, birth control is not only not a wrong, but it is of great instrumental utility – it facilitates the enjoyment of a basic human good.⁹⁰ If so, then we seemingly have not only a constitutional right to its use, but at least a moral right as well to its dispensation.

In the next section below, I will make a general argument against both the valorizing prong of the sexual libertarian's conception of heterosexual morality, *and* the particular argument for the instrumental value of birth control which it implies – *not* because I disagree with its pragmatic bottom line –I fully support the birth control mandate in the ACA -- but because, in my view, the argument overstates the connection between sexuality and liberty, slights the harms to women that are inherent within the conception of heterosexual morality on which the brief rests, and ultimately badly distracts us from the need to assert and defend the stronger moral case for the dispensation of birth control, which ought to rest on its

⁸⁷ For an argument that although this was how the decision was widely read, that this was likely not what the Court intended, see Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (1980).

⁸⁸ Thus, David Richards argued in the aftermath of *Eisenstadt* that birth control is of such high value in large part because it frees women to enjoy sex, without fear of pregnancy, and perhaps for the first time in history. DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 259 (New York: Oxford University Press, 1986).

⁸⁹ DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (Berkeley: University of California Press, 1998).

⁹⁰ David Richard makes this argument directly, albeit briefly, in David A.J. Richards, *TOLERATION AND THE CONSTITUTION* 259-60 (New York: Oxford University Press, 1986).

facilitation of a woman's control of her own fertility, rather than the enhancement of sexual liberty. As a result, I will argue, the sexual libertarian's account of the utility of birth control has real costs, one of which is that it doesn't go far *enough* toward establishing – or even articulating -- a firm moral foundation for a woman's control over her own fertility.⁹¹ Before turning to those arguments, however,

⁹¹ The sexual libertarian's argument for the legalization and dispensation of birth control – that birth control has great social utility because it facilitates autonomous sexuality, which is in turn an intrinsic human good – is not the only possible argument for the dispensation of birth control. It is, for example, most decidedly not the argument pressed by the United States government in the *Hobby Lobby* case or articulated in the Affordable Care Act itself, which seemed to go out of their way to avoid it – as noted above, the argument pressed in those for a by the government is that the utility of birth control lies in its contributions to women's health, not its facilitation of sexual liberty. And, I will argue below that the strongest case for the social and individual utility of birth control – and hence for its dispensation -- lies precisely in what both accounts – the sexual libertarian's celebration of sexual liberty and the public health administrator's invocation of women's health – elide, and that is its enhancement of women's control over their own fertility. That is hardly a new claim; it is basically the same claim that was made by feminists in the birth control movement during the entire first half of the twentieth century.

But this doesn't make the sexual libertarian's quite different, even if obviously related argument – that birth control has utility because it liberates sexual expression – unimportant (or even worse, a strawman), and for two reasons. First, from the popular press, and particularly from critics of the birth control mandate, it seems to be widely assumed that something like the sexual libertarian's brief for birth control is the *unstated* argument behind the mandate itself – that while the mandate talks in terms of women's health, its actual rationale must be something else (since the mandate is not limited to a requirement that employers make birth control available only where it is required for health reasons) and that actual rationale just must be a commitment to sexual liberty.

⁹¹ While this is often expressed in contemptuous and offensive ways, it is nevertheless not an unreasonable assumption: as Thomas Grey argued several decades ago, something like what I'm calling the sexual libertarian's brief was widely read into the *Eisenstadt* and *Griswold* opinions, not by the Rush Limbaughs of the world, but rather, by the sizeable community of professional liberal readers in the legal academy, as the actual, albeit not clearly stated, rationale for those decisions. Likewise, the sexual libertarian's account of those cases – meaning, an account of *Griswold* and *Eisenstadt* as resting on a commitment to sexual liberty, rather than to either control of fertility or women's health -- was also, according to David Garrow's meticulous history of the period, the understanding and the hoped-for understanding of *Griswold* held by a number of the litigators of that famous case. And, perhaps most consequentially it is the interpretation that was at least implicitly embraced by the Court's decision decades later in *Lawrence*. It is, in other words, widely believed, not just by natural lawyers and a handful of crude radio talk

I want to distinguish more fully what I've called the "censorial prong" of the sexual libertarian's conception of sexual morality, from the valorizing claim. The libertarian's censorial claim -- that consent is a necessary condition for moral (as well as legal) sex, such that all nonconsensual sex is immoral and (in most cases) illegal -- as well as the law reform movements it has motivated, have given rise, over the last forty years, to a cottage industry of intra-liberal and intra-libertarian scholarly critique and political agitation. I want to make clear that the argument I will be making here does not address those debates, all of which I have addressed in detail elsewhere. Nor will I be addressing the argument for the legalization of birth control based on the limits of the libertarian's censorial claim: the argument, that is,

show hosts, but also by sexual libertarians themselves, and scores of legal theorists, as well as a wide swath of the general public, that at least a significant part of the case for both our constitutional right to birth control, and whether or not people are willing to say so, is that it liberates autonomous sex from an otherwise inhibiting material condition -- the condition of pregnancy itself. It is not a huge leap from that understanding of those constitutional cases to the conclusion that the same argument must therefore underlie the case for its dispensation as well. I believe this is wrong -- that sexual liberty is not the best argument for the birth control mandate, or even an argument for it -- and importantly so, for reasons I will discuss. But it seems to me incontrovertible that something like the sexual libertarian's brief is at the heart of the constitutional right to the use of birth control, and at the heart of the policy behind its dispensation.

But the sexual libertarian's brief for birth control is important for a second reason as well. Whatever the role the sexual libertarian's argument plays in our understanding of constitutional doctrine, and whatever the role it plays in our arguments over the mandate, it rests on a conception of the intrinsic value of autonomous sexuality that has come to have independent strength, significance and importance. Other commitments can be and are readily inferred from it, including most prominently the morality of gay sex and the case for gay marriage. The sexual libertarian's brief for birth control, in other words, is important not only for the role it is playing in the development of our law, but also because of the general claim about the morality of sexuality on which it rests, and the important implications that can be drawn from it. Birth control and gay marriage seemingly rise and fall together: for both sexual libertarians and sexual conservatives, they are both premised on the sexual libertarian's claim regarding the morality of heterosexuality. They are therefore widely regarded as mutually supportive -- the strength of the claim for birth control bolsters the strength of the cases for gay sex and gay marriage -- and mutually endangered. A weakening of the case for or the commitment to birth control, on this view, threatens the commitment to gay marriage. The sexual libertarian's brief for birth control is thus important because it seemingly rests on a conception of sexual morality that grounds the case for gay sex and gay marriage as well. If the former is weak so is the latter; we must protect the former, then, if we value the latter. So, the argument matters, even if it's not the best argument that might be pressed for birth control -- I think it's not, and will so argue below -- but the argument matters, for its negative collateral damage.

that the use of birth control is victimless and like all other such conduct, both sexual and otherwise, should not be criminalized. I completely agree. Here, I will be making an argument instead against the libertarian's valorizing claim and the particular argument for the dispensation of birth control, which it implies. I think it's a bad argument with unfortunate implications, but again, I *don't* disagree with its conclusion. I don't, that is, disagree with the ACA's birth control mandate itself. But first, I want to give more texture to the censorial claim, partly so as to emphasize the distinction between them. The valorizing claim, which I will criticize, and the censorial claim, which I will not, are often conflated, or – even more commonly – believed to entail the other. They don't entail the other, and they should not be conflated.

So again, the valorizing claim is that autonomous sex is an intrinsic good, the censorial claim is that nonconsensual sex is a violation of autonomy and is always bad. Occasionally there is outright opposition to the libertarian's censorial claim – the claim, that is, that nonconsensual sex is always immoral, and with only a few narrowly drawn exceptions (if that) ought to be illegal as well. Some social conservatives, for example, argued as late as the 1980s, in response to campaigns to abolish the marital rape exemption, that a requirement of consent within marriage would be an undue imposition on what ought to be a patriarchal privilege, or that it would impermissibly invade marital privacy, or that blanket consent is given to all marital sex at the altar, thus obviating any need for consent to particular sexual acts during the course of the marriage.⁹² Similarly, until the 1970s, or thereabouts, the law of rape in most states required, in addition to the lack of consent, some requisite degree of force on the part of the aggressor and some amount of resistance on the part of the victim: if a woman had not resisted, and a man had not used force, there was no rape, regardless of the presence or absence of consent. Thus, nonconsensual sex alone, according to the conception of heterosexual morality that underlaid that legal scheme, is not what should be condemned, rather, it is *forced sex*, or *violent sex*, or forced sex between strangers, or, putting these together, forced sex between strangers that is vigorously resisted by the victim, that should be understood as wrong or criminal. These traditional requirements of the law of rape had their defenders well into the last quarter of the last century and occasional defenders in the first quarter of this one as well.⁹³ In the 1990s and 2000s, however, critique of the familiar libertarian claim that consent is a necessary condition of moral sex, such that the *lack* of consent is sufficient for sex to be so wrongful as to be rape, has come from a different political quarter: some queer theorists have either resisted the necessity of consent to the morality of sex, or sought to define the consent that is

⁹² See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1268 (1986).

⁹³ On force requirement, see Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 YALE L.J. ONLINE 389 (2013).

required so broadly as to render it almost meaningless. Foucault, for example, argued that even a child should be *presumed* to consent to the sexual advances of an adult unless he or she fights back quite strenuously⁹⁴; and David Kennedy has argued in a similar mode that we should stop “fetishizing” consent in our adult sexual lives.⁹⁵

More widely, queer theorists and some sexual libertarians themselves have worried that legal attempts to define consent in such a way that it must be clearly communicated in order to be legally effective, such as through yes means yes or no means no campaigns or through broadened definitions of sexual harassment, unduly cramp sexual expression.⁹⁶ And finally, even aside from disputes over the contours of rape law, the (to some of us) banal liberal and libertarian idea that consent, or more broadly, respect for autonomy, is a necessary condition of moral sex has sparked some controversy and unease. Good sex, some critics say, whether we mean that “good” hedonistically or morally, doesn’t *feel* all that autonomous; good sex feels like the sort of thing we get “swept up” in rather than something we choose; it feels like something that we are compelled to do, and the better the sex all the more strongly that hotly desirable feeling of compulsion.⁹⁷ What can consent possibly have to do with all that? Autonomy itself -- and therefore consent, if consent is its proxy -- regardless of how we should define rape, doesn’t seem like a very good descriptive account of the sex that at least many of us, much of the time, both enjoy and find morally unproblematic. However one defines the lack of consent that might suffice to render sex rape, it’s not at all obvious that autonomy is the value behind the sex we enjoy, or even that it’s anywhere in sight. For many of us, in fact, quite the contrary seems to be true, as all those bestselling *Shades of Grey* novels pretty clearly attest. And if that’s true, perhaps consent is not quite the necessary condition for good sex that so many feminists and so many liberals, in rape reform movements all over the country and throughout the last half-century, have believed it to be. That fact alone has caused a fissure of sorts between liberal and liberal feminist understandings of the necessity of consent to moral sex, and pro sex and queer theorists more phenomenological account of the seeming tension between that claim, and the feel of sex itself. Consent, and autonomy, doesn’t “feel” necessary to the enjoyment of sex – quite the contrary in fact -- therefore, perhaps it isn’t necessary to the morality of it as well.

⁹⁴ MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE, INTERVIEWS AND OTHER WRITINGS, 1977- 84* (Lawrence D. Kritzman, ed., New York: Routledge 1988) 204-05.

⁹⁵ David Kennedy, piece in book on Clinton Impeachment (I’ll supply)

⁹⁶ JANET E. HALLEY, *Sexuality Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catherine MacKinnon & Reva Siegel eds., Yale University Press, 2002); Janet E. Halley, *Harvard’s New Sexual Harassment Policy Must Change*, WBUR, COGNOSCENTI (Nov. 14, 2014), available at <http://cognoscenti.wbur.org/2014/11/14/sexual-harassment-harvard-university-janet-halley>.

⁹⁷ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

I do not want to address or be read as addressing those controversies here; I have elsewhere.⁹⁸ Instead I want to look more closely and more critically at the libertarian's *valorizing* claim, which, unlike the censorial claim, is broadly shared, by liberals, sexual libertarians, pro-sex feminists, and queer theorists all, and on which is built the libertarian case for the instrumental value of birth control, and hence the argument for its broad-based dispensation. Over the last half-century, the sexual libertarian's valorizing claim regarding autonomous sex – by which I mean its embrace of autonomous sexuality as an intrinsic human good -- has either implicitly or explicitly informed a number of pro-sex, liberalizing legal reforms, beginning with, but then moving well beyond the birth control movement itself.⁹⁹ It has, most recently, been at the heart (although not always explicitly so) of the various legal and political movements that have challenged moralistic censure of gay and lesbian sex: if consensual sex is an intrinsic good, then consensual gay sex is as well.¹⁰⁰ It has likewise motivated and informed the liberal feminist campaign¹⁰¹ against the various antipornography ordinances that were drafted by radical feminists in the nineteen eighties, and that were aimed at providing women a private cause of action against pornographers.¹⁰² If the sex depicted in pornography is consensual on all sides, according to liberal feminist anti-censorship theorists and activists, then not

⁹⁸ Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000); ROBIN WEST, *Sex, Law and Consent*, in *The Ethics of Consent: Theory and Practice* 221–50 (Franklin G. Miller & Alan Wertheimer, eds., Oxford: Oxford University Press, 2010); Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1 (2006); Robin West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385 (2005).

⁹⁹ David Richards for example discusses birth control, and its instrumental value for the enjoyment of autonomous sex, only very briefly, in DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 259 (New York: Oxford University Press, 1986). He doesn't even mention much less discuss or take seriously the possibly deleterious effects of that argument. Other sexual libertarians give it shorter treatments or none at all. David Garrow's legal history of birth control, tellingly titled *SEXUALITY AND LIBERTY*, is a meticulous history of the sexual libertarian case for birth control. Again, he does not provide any discussion at all of the claim's limitations, nor does he discuss the critical views of others, other than those of conservative sexual moralists opposed to birth control.

¹⁰⁰ David A. J. Richards, *Women, Gays, and the Constitution* (University of Chicago Press, 1998); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 270-71 (New York: Oxford University Press, 1986); Chai Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005); CARLOS BALL, *SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW* 76-78 (2014); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995).

¹⁰¹ FACT Amicus Brief, *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

¹⁰² CATHARINE A. MACKINNON, *ONLY WORDS* (Cambridge: Harvard University Press, 1993); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (Cambridge: Harvard University Press, 1989).

only does it do no harm, but it is also serves (and is) an intrinsic good: sexual expression, like sex itself, is conducive to full and rich lives for women as well as for men, unlike the censorial impulse that seeks to repress it, and pornography, so long as it is consensual, facilitates that expression.¹⁰³ The same commitment has likewise been at the core of a number of self-labelled “pro-sex-feminist” legal arguments of the eighties and nineties, including critiques of the “hostile environment” prong of sexual harassment law¹⁰⁴ and of perceived excesses in the reach of feminist reforms of rape law, both of which, according to pro-sex feminists, endanger the free expression of sexuality.¹⁰⁵ Likewise, it is the foundation for queer theorists’ internal challenges to the liberal campaign for same sex marriage: that campaign is obviously committed to a domesticated and assimilated form of gay sexuality, that willingly embraces explicitly conservative constraints on sexual expression outside of marriage.¹⁰⁶ At the more extreme margins, the valorizing claim has been at the center of queer critiques of the safe sex campaigns encouraging the use of condoms among gay men.¹⁰⁷ Again, the logic of all of these pro-sex movements rests on the valorizing prong of the liberal conception of sex: Autonomous sex is an intrinsic human good. Consent may or may not be a *necessary* condition for moral sex; on that, sexual libertarians and queer theorists sometimes split. But it is clearly a *sufficient* condition for the morality of sexual acts. On that, they all agree. Autonomous sex is very, very good, including autonomous heterosexual sex. And, because it is so good, birth control, which liberates it, is of high instrumental value. Autonomous sex is a human good, and therefore contracepted heterosexual sex is likewise, simply because birth control provides the means by which heterosexual sex can be all the more unconstrained.

Now, unlike the censorial claim, neither the libertarian valorization of autonomous, non-procreative heterosexual sex nor the argument for the utility of birth control that it implies, has been subjected to much criticism, or even much discussion, within liberalism itself – in fact, there’s virtually *none*. In this way too, the parallel with the neo-natural lawyer’s conception of heterosexual morality is striking: just as the harms caused by marital sex have been unnoticed or unreckoned by neo-natural lawyers, so the harms caused by autonomous heterosexuality have largely been unnoticed or unreckoned by sexual libertarians.

¹⁰³ FACT Amicus Brief, *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General’s Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681 (1987).

¹⁰⁴ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); KATHERINE M. FRANKE, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

¹⁰⁵ Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 YALE L.J. ONLINE 389 (2013).

¹⁰⁶ MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (Cambridge: Harvard University Press 2000).

¹⁰⁷ For discussion, see Marc Spindelman, *Sexual Freedom’s Shadows*, 23 YALE J.L. & FEMINISM 179 (2011).

Liberals, sexual libertarians, queer theorists, and pro-sex feminists have argued instead, and incessantly, over the meaning and limits and implications for law of the libertarian's censorial claim: what "counts" as consent, what might be the markers of non-consent, and whether non-consent is or isn't sufficient to render sex criminal. Does yes mean yes, and does no mean no?¹⁰⁸ What is and what should be the consequence of mistakenly interpreting a "no" as a "yes"? Does deceit, like force, sufficiently vitiate consent so as to render the sex to which it may lead a crime?¹⁰⁹ They have looked minutely, to borrow Alan Wertheimer's phrase, at the "morally transformative" function of consent in the criminal law and in positive morality both: the way in which consent, and the permission it conveys, transforms what would otherwise be immoral and possibly illegal assaultive behavior into something that is at least permitted.¹¹⁰ They have examined, criticized, torn apart, dissected, deconstructed and reconstructed the censorial claim, in other words, minutely (and well beyond, in my own view, any reasonable need to do so. Yes, all sex should be consensual. No, it doesn't follow from that, that *all* non-consensual sex should be *criminal*, or criminalized to the same degree. Non-consensual sex that is obtained through deceit that vitiates consent should not be criminal, and for the most part it isn't. And of course there should be degrees of criminality for the nonconsensual sex that is and should be criminal: some forms of nonconsensual sex are more harmful than other forms of nonconsensual sex. And yes, autonomous sex includes sado-masochistic sex that paradoxically has all the trappings of nonconsensuality – handcuffs, whips, chains and so on. Consensually enacted rape isn't rape anymore than its slavery. There's room for disagreement here, but perhaps less than contestants imagine.).

Given the elaborate care with which sexual libertarians have examined the censorial claim, it is all the more striking that they haven't looked nearly so closely, and almost never critically, at the sex they *valorize*. And because of that, they have not looked at the harms that might be intensified by their particular argument for the instrumental utility of birth control. What does the liberal's blanket approval of autonomous, non-procreative heterosexual sex (hereinafter, autonomous sex), in all its guises, cover? What harms does it legitimate? The next section attempts a broad outline of what those harms might be, and concludes with suggestions of how to minimize them, including an examination and reconstruction of the libertarian's brief for birth control.

¹⁰⁸ Jed Rubenfeld, *Mishandling Rape*, THE NEW YORK TIMES SUNDAY REVIEW, Nov. 15, 2014, available at http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?_r=0.

¹⁰⁹ Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 YALE L.J. ONLINE 389 (2013).

¹¹⁰ ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS (Cambridge: Cambridge University Press, 2003); Alan Wertheimer, *Consent and Sexual Relations*, PHILOSOPHY OF SEX: CONTEMPORARY READINGS, (Alan Soble, ed., Lanham and Boulder: Rowman and Littlefield Publishers, 2002)

d. Is Autonomous Sex an Intrinsic Good? One Critique

Heterosexual sex that is unambiguously consensual – in short, “autonomous sex” -- may nevertheless be harmful. A few of those harms are recognized, and much discussed, by liberals and conservatives both: autonomous sex can, after all, cause both sexually transmitted disease and, if birth control fails or is misused, unhealthy as well as unwanted and unwise pregnancies. Because of both, it can sometimes have quite disastrous consequences; it can alter the course of a life, or end one. Liberals and libertarians who valorize autonomous sex of course realize this, and that realization grounds their argument for the instrumental utility of birth control. Because unhealthy, unwise, and unwanted pregnancies can result from autonomous sex, birth control has great instrumental utility: it is, in effect, a material condition for the autonomous heterosexual sex that they valorize. Contraception, then, is not just “not wrong.” It is materially necessary for the realization of a natural human good: autonomous sex that is free of both reproductive consequences and free of the worry and fear of those consequences. Such sex is a positive good, and birth control is necessary to enjoy it. Sexual libertarians are not, in short, blind to the harms of harmful pregnancies, quite the contrary. Those harms are central to their brief for the instrumental value of birth control.

But are there nevertheless harms attendant to autonomous sex, to which they are inattentive? I believe there are, and that they are almost never even acknowledged or named – much less addressed -- within liberal and libertarian discourses on sex and sexual morality. There are two -- and they echo the harms risked by marital sex. First, autonomous sex may be *unwanted* even if it is not rape, just as might marital sex. And second, autonomous sex might lead to unwanted pregnancy, either because of the failure of birth control, a decision not to use it for moral or financial reasons, or a failure to use it correctly because of recklessness or ignorance. I’ll take up these two harms in that order.

So, first, autonomous sex, like marital sex, might be unwanted, and when it is, it might be harmful. A girl or woman may consent to sex with her boyfriend or partner for some of the same reasons a wife may consent to unwanted sex with her husband: she may consent to unwanted sex because she doesn’t want to lose him or his affection, or because she doesn’t want to risk the fight that will ensue if she doesn’t, or because she is afraid of his future violence if she withholds consent, or because she wishes to keep domestic peace in her household if they cohabit, or to protect her children from her his anger. A young woman or girl not involved in a long term relationship, may also consent to heterosexual sex she doesn’t want for other reasons as well, not so obviously or so often shared with married women: she may consent to unwanted sex because she wrongly believes, out of simple naivete, that the sex is unstoppable or “unavoidable” once her partner is aroused, or because she pities or likes her partner, or to impress her friends, or for the approval or admission to a peer group, or, of course, because she thinks she needs to do so in order to get a good grade (or a raise) she may or may not deserve. According to a growing consensus among sex researchers, unwanted consensual sex, no matter how motivated, is extraordinarily common among sexually active young teenage

girls, and among a surprisingly high percentage of sexually active young teenage boys as well.¹¹¹ They differ on the likelihood of the various motivations, but seemingly concur on the frequency of unwanted sex itself.

And, in the last fifteen years, social work and sociology scholars have also (and finally – this is overdue) begun to look at some of the harms caused by the sufferance of unwanted consensual sex, at least among college age women -- as opposed to the harms caused by nonconsensual sex, or rape, which has been the subject of intense and extensive study for at least fifty years. The work is in its infancy, but it is growing. And, according to those studies, young, college-age women who engage in unwanted but consensual sex disproportionately suffer from depression and related psychological and emotional harms, they are less likely to use or insist upon birth control, so more likely to also suffer unwanted pregnancies, they have reduced self esteem and sexual agency.¹¹² These harms, furthermore, are likely to be long-lasting, they don't continue only for the duration of the sex itself, or the sexual relationship. There is also a fair amount of scholarship from scholars in social work, on the psychological, emotional, and also physical harms of the phenomenologically consensual sex (meaning, sex that would clearly count as consensual but for the age of the girls and boys involved) engaged in by younger girls and boys both, in high school and middle school.

The empirical research is welcome and overdue, but it is also still limited, both in terms of the number of such studies, but also in its scope and depth. In particular, along with a number of feminist philosophers and some legal theorists,¹¹³ I have argued at length elsewhere¹¹⁴ that all of that unwanted consensual sex -- what Shari Motro calls "Sex Against Desire," (or SAD, for short) -- regardless of the age of the women or girls who engage in it, might carry distinctly psychic and even political harms, in addition to the emotional harms to self esteem and health that have been studied to date. Those political and psychic harms, as far as I can tell, at least thus far have *not* been so closely studied by either social scientists or social workers, although they are obliquely evidenced in one quite extraordinary unpublished qualitative study of unwanted sex by a Marxist-feminist

¹¹¹ Two books on sex in middle schools.... (I'll find)

¹¹² See notes ___ to ___ supra.

¹¹³. See also Chai Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005); Mary E. Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165 (1998) Shari Motro, *Scholarship Against Desire*, 27 YALE J.L. & HUMAN. 115 (2015); Susan F. Appleton, *Toward a Culturally Cliterate Family Law*, 23 BERKELEY J. GENDER L. & JUST. 267 (2008).

¹¹⁴ ROBIN WEST, *The Harms of Consensual Sex*, PHILOSOPHY OF SEX: CONTEMPORARY READINGS, (Alan Soble, ed., Lanham and Boulder: Rowman and Littlefield Publishers, 2002); ROBIN WEST, *Sex, Law and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221–50 (Franklin G. Miller & Alan Wertheimer, eds., Oxford: Oxford University Press, 2010); Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1 (2006); Robin West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385 (2005).

scholar,¹¹⁵ and, much more explicitly, in some feminist memoirs.¹¹⁶ As I have characterized them, the psychic or political harms of unwanted sex echo the harms discussed above of unwanted pregnancies. First, like the woman who carries an unwanted pregnancy, a woman or a girl's physical integrity and her sense of herself as having physical integrity, is invaded when she opens herself up, physically and literally, to penile penetrative sex she does not want and does not find pleasurable. Her body becomes, to that degree, fluid, or porous: she views her own body as boundaryless in ways that are inconsistent with -- I think violently inconsistent with -- the conception of the bounded body so central to liberal theory.¹¹⁷ Second, and again like the woman who bears an unwanted pregnancy, a woman or girl who consents to unwanted sex compromises her self-sovereignty: she willfully subjugates her body and her will to someone else's. She acts in ways inconsistent with her own desire, and not in furtherance of her own pleasure. Again, the "self" she creates through these choices is in sharp contrast to the willing, choosing, and preferring "self" assumed by but also partly constructed by liberalism, who relentlessly chooses based on preferences that in turn track the subject's own, rather than another's, pleasures and pains. Her autonomy is likewise stunted, when she subordinates her own ends to those of another, and her self possession is threatened, when she applies her body to the work of providing a vehicle for someone else's pleasure.¹¹⁸ And lastly, her own moral integrity is undermined, if she lies to her partner and herself about her own pleasures or reasons for consenting to the sex she doesn't want. Physical integrity, autonomy, self-sovereignty, self-possession and integrity are all central components of the liberal, political self. When women and girls willfully relinquish them in their sexual lives, they are in effect relinquishing their entitlement to the enjoyment as well as the challenges of that widely lauded as well as widely expected -- and intensely political -- way of being in the social world.

Although there isn't much empirical scholarship on this, again, there is some, particularly regarding the harmful effects unwanted consensual sex on college campuses. There is much less empirical scholarship -- I can't find any -- on either the emotional or the political harms suffered by married women, older women, or simply women in long term relationships (rather than college students in short term relationships) who routinely and over time -- sometimes over the course of an entire adult lifetime -- consent to unwanted and unpleasurable sex. It does though seem fair to infer that if college women are harmed, either emotionally or politically, by occasional unwanted sex, then such women are likely harmed all the more profoundly. A married woman's physical integrity -- her ownership of her body's boundaries -- is obviously far more severely compromised, if she quite literally and

¹¹⁵ Alyson Spurgus, *Embodied Invisible Labor and Sexual Carework*, unpublished ms, on file with author; Susan F. Appleton, *Toward a Culturally Cliterate Family Law*, 23 BERKELEY J. GENDER L. & JUST. 267 (2008).

¹¹⁶ ANDREA DWORKIN, *INTERCOURSE* (New York: Free Press, 1988).

¹¹⁷ This is graphically and powerfully presented in Andrea Dworkin's masterful work *Intercourse*. ANDREA DWORKIN, *INTERCOURSE* (New York: Free Press, 1988).

¹¹⁸ See notes ___ to ___ *supra*.

routinely and even as a matter of self identity opens up her body in service of another's pleasures, will, and ends. That permeable, fluid body, after all, defines her adult body, not just her occasional participation in casual sex.¹¹⁹ Likewise, a married woman's agency and sense of agency will be even more badly compromised than the college student's, if the wife routinely, and over years, puts her self and her body to the work of participating in an action she does not want. It is hard to imagine a healthy sense of one's own agency either developing or being sustained over the course of an adult life in which a woman as a matter of identity and habit bends her will regarding her own body for the sake of another's physical pleasure.¹²⁰ The same is true of a married woman's moral integrity, and a wife's overall sense of selfhood. The "self" as understood by liberal thought -- meaning a self that both constitutes and asserts a unity of choice, desire, pleasure and preference -- one might think, could be badly diminished, in those marriages or long term relationships in which a woman routinely and over years acts and chooses to act, not on the basis of her own pleasures, preferences and desires, but on the basis of and reflecting the pleasures, desires and preferences of her partner.

What I want to stress, that I believe goes beyond the claims made in the empirical literature, is that the harms to selfhood sustained either occasionally by young women or over time by older women, could and should be characterized as at least potentially *political*, and not just psychic or emotional. A woman who routinely engages in unpleasant, unpleasurable, unwanted and unwelcome sexual intercourse, even if consensual, and whether or not marital, might come to regard herself, and others may regard her likewise, as being in effect the "kind of person" who has no physical integrity, and who might of course *have* pleasures and pains but whose pleasures and pains are irrelevant or marginal to her body's actions, and who may have and act on her own choices, but whose choices do not reflect her own desires, and who obviously has a body, but one which exists for the purpose of another's sexual fulfillment. As this becomes normalized and routinized, she may become that much less of a "liberal subject": a person who is prepared and presumed to interact in a world in which a subject's consent to actions, trades, bargains and institutions track the subject's preferences and her desires. She consents to all this sex, but that consent -- *her* consent -- does not, at least in a very important dimension of her life, track her own preferences and desires, rather than her partner's. This is a distinctive and quite different political harm than the harm done to a woman who has been raped: the woman who consents to unwanted sex is

¹¹⁹ On the fluidity and boundary-lessness of women's bodies, see ANDREA DWORKIN, *INTERCOURSE* (New York: Free Press, 1988) and EILEEN McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (New York: Oxford University Press, 1996).

¹²⁰ On the importance of agency and a sense of agency to a woman's wellbeing and equality, see Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 824-831 (1999).

Agency emerged as a central dimension of women's equality in the 1990s, but as far as I know, agency has not been linked to women's engagement in unwanted sex, in the way I have asserted in the text.

acting and experiencing herself as acting in a way that is contrary to the unity that we assume in the liberal self – a unity of desire and preference and choice, or act. The political harm of consensual unwanted sex, then, if this is right, is that the woman or girl's capacity to live as a "liberal self" is badly undercut. Quite plausibly, although again there's no research on this, at least that I can find, that might in turn limit both her viability and her potency in a liberal world hardly designed to accommodate someone so constituted. Consequently, she becomes an illiberal subject in a liberal world. It may not be quite so surprising that such illiberal women in liberal societies have a greater tendency toward self-abnegation, self denial, sacrifice and altruism than their more atomistic husbands, brothers, fathers and sons. It may not be so surprising, even, that they don't raise their hands in law school classes very often and that they aren't very adept at bargaining for a decent price when buying a used car.¹²¹ All of that unwanted sex to which they consent might be part of the problem, and for that reason alone, if no other, it should count as a harm. Again, the libertarian's valorization of autonomous sex is seemingly blind to it.

And finally, the libertarian's blanket celebration of autonomous and non-procreative sex covers not only harmful unwanted sex, but it also covers the autonomous sex, whether wanted or not, that leads to unwanted pregnancies: those pregnancies that occur when birth control fails, or -- what is far more frequent -- pregnancies that occur when it is not used because of oversight, ignorance, unavailability, or because of a moral belief in its wrongfulness. Unwanted pregnancies themselves, as argued above and as widely acknowledged, are clearly harmful in some recognized and objective ways: An unwanted pregnancy that may result from autonomous sex, no less than an unwanted pregnancy that may result from marital sex, may be carried to term, if the woman is opposed to or cannot afford an abortion or cannot access one, or it may be aborted, but either way, the pregnancy carries with it severe financial and health risks. Shari Motro has persuasively argued that these costs should be shared between the partners, whether they are cohabitating or casual.¹²² As with marital unwanted pregnancies, though, unwanted pregnancies caused by autonomous sex also carry the less recognized or at least less theorized psychic and political harms discussed above: an unwanted pregnancy, unlike a wanted pregnancy, is an unwelcome intrusion into and upon a woman's body by the life and needs of another human being, with attendant, and unwelcome, limits on her mobility, challenges to her health, and truncation of her self-possession, autonomy and self-sovereignty. Her body exists, against her desires, for the interests of another, and her will follows suit.

Sexual libertarians obviously recognize at least some of the harms occasioned by unwanted pregnancies. Indeed, recognition of those harms is central to both the libertarian's argument for the right to use birth control and their argument for its dispensation: pregnancy and the fear of pregnancy inhibit

¹²¹ Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, Am. Econ. 85 AM. ECON. REV. 304 (1995); Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421(1992).

¹²² Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011).

autonomous sex, autonomous sex is a natural good, and birth control is therefore of great instrumental value. And, the sexual libertarian argument for birth control – that birth control is of value because it facilitates autonomous sex – is often intertwined with the (quite different) liberal and feminist argument that I will endorse below, that birth control is of value, primarily, because it facilitates control of fertility. But what sexual libertarians have *not* done -- nor have liberal feminists, at least that that I can find -- is argue that the *morality* of autonomous sex, because of the pregnancy to which it may lead, is, precisely because of that risk, *not* unconditional. Nowhere, that I have found, in libertarian, liberal or feminist arguments for either birth control or for legal abortion, is there even a suggestion that in the absence of reliable birth control, parties simply should not have sex. Nowhere in that voluminous literature is there a suggestion that *uncontracepted* autonomous sex, even if fully consensual, is both unwise *and immoral*, if the parties do not want to conceive. And accordingly, nowhere in liberal, liberal feminist or libertarian arguments for birth control or legal abortion, is *any* of the burden or blame for the unwanted pregnancy placed upon the consenting, autonomous parties themselves. Nowhere is there a suggestion that by virtue of having sex when they are knowingly risking an unwanted pregnancy, that they have therefore done something which is immoral or wrongful. Weirdly, all these unwanted pregnancies are immaculate conceptions: maybe they are harmful, but if they are, the sex is not to blame, rather, the law is.

This is a profound, and striking, lack. It has two consequences. The first is simply that because of it, the liberals, liberal feminists, and sexual libertarians who have all argued strenuously for a right to use birth control, and for its availability, through insurance and otherwise, have *not* argued for the existence of a moral duty to *use* it. They have not argued that the use of contraception is a condition of the morality of autonomous sex where conception is unwanted, nor have they argued in the alternative, so to speak, that if contraception is not available, that there is a duty then not to have the sex that might lead to it. I will return to this below. But second, and more broadly, that the almost quintessentially liberal and libertarian celebration of autonomous sex – a celebration of sex that does on occasion lead to unwanted pregnancies -- has been subjected to virtually no intra-liberal criticism in the legal literature of which I'm aware, and almost none elsewhere. Liberal and libertarian arguments for the right to use birth control and now for a governmental obligation to make it available through health plans are ubiquitous. Arguments that the morality of autonomous sex where conception is not a desired outcome is fully dependent upon the responsible *use* of that birth control – and hence for either a duty and not just a right to either use birth control or not have sex, when either or both parties do not wish conception to result – are virtually nonexistent. Quite the contrary in fact: the relative availability of birth control and abortion have ironically deepened – not conditioned – the unqualified liberal valorization of autonomous sex. The sheer number of unwanted pregnancies that are its result, where birth control for whatever reason is not used or not used correctly, has not – with the exception of liberal endorsement of sex education campaigns that include information about birth control, as a partial solution to the perceived problem of teen pregnancies -- appreciably lessened the ardor with which the case is made.

Now, by contrast, and it's a vivid contrast, the harm of the unwanted pregnancy *itself* is not at all invisible to the liberal imagination. In fact, at least two prominent liberal legal scholars – Jed Rubenfeld from Yale Law School and Andrew Koppelman, from Northwestern -- have argued over the last fifteen years that the harm of unwanted pregnancy is so profound as to be akin to the harms of slavery. In fact, for just that reason, Andrew Koppelman has argued that *Roe v Wade* might be best defended as a Thirteenth, rather than Fourteenth Amendment decision. I think both Rubenfeld and Koppelman's arguments are powerful, and largely persuasive: along with Eileen McDonagh's important work *From Choice to Consent* from the 1990s, and Judith Thompson's early 1970s philosophical defense of abortion, the Rubenfeld-Koppelman analogy captures better than most, the severity and the profundity of the harms occasioned by unwelcome or unwanted pregnancies. Nevertheless, what both Rubenfeld and Koppelman infer from their analogy of pregnancy to slavery, is *not* the wrongfulness of the autonomous sex that risks occasioning this crippling, enslaving harm. Rather, what both men infer from the harms they recognize in an unwanted pregnancy is the wrongfulness not of the sex that risks it, but of laws that would criminalize abortion. Morally speaking, the sex itself, for both theorists, gets off scot free: for both, it's not the sex that is wrongful, or the decision to engage in it, it's the laws prohibiting abortion that are to blame. This is logically peculiar if nothing else. Surely the sex itself, and the decision to engage in it, and not just anti-abortion laws, is at least complicit in causing all those unwanted pregnancies, and the misery they in turn entail.

So, finally, why? Why are the harms of autonomous sex – both the harms of unwanted sex itself and the harms of autonomous sex, whether wanted or not, that leads to unwanted pregnancies -- so invisible within the liberal conception of heterosexual morality? Why are *those harms* so invisible to the “liberal imagination”? I think there are a host of reasons, some of which have nothing to do with sex or pregnancy, but rather are central to liberalism, or to some of its variants. First, and as I've argued briefly above, and elsewhere at length, the very idea of “consensual harms,” in some economically grounded versions of liberalism, is virtually oxymoronic: consent is widely regarded within economic liberal theory as the mechanism by which value is created, with the unfortunate consequence that consensuality is viewed as in effect precluding the visibility of harms that may be caused by any consensual transaction.¹²³ Pareto optimal transactions just can't be harmful, and consensual sex, whatever else it is, is pareto optimal. Consensuality is also central, though, to some libertarian as well as liberal feminist understandings of autonomy: the free or autonomous individual, for the libertarian, simply *is* the individual who chooses between options, whether in economic or political or

¹²³ Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384(1985); ROBIN WEST, *Sex, Law and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE, eds. Franklin G. Miller and Alan Wertheimer (Oxford University Press, 2010); Robin West, *The Harms of Consensual Sex*, 94 AMERICAN PHILOSOPHICAL ASSOCIATION NEWSLETTERS (1995), reprinted in Thomas A. Mappes and Janes S. Zembaty, eds, SOCIAL ETHICS: MORALITY AND SOCIAL POLICY (Boston: McGraw-Hill, 2002).

intimate markets. For non-economic libertarians, then, consent is emblematic of as well as constitutive of autonomy; consent itself is a sort of intrinsic as well as instrumental good. If consensual transactions are intrinsically good, then obviously the same is true of consensual sexual transactions. Increasing the number and availability of opportunities for consensual sexual transactions increases not only the wealth of the world, as per the economic legalist, but the autonomy of the world likewise, as per the libertarian.

Sex, however, is also distinctively and peculiarly valorized within contemporary liberalism across the board, and so *autonomous* sex is all the more so: autonomous sex combines the value of consensuality with the value of sex. Sex, in the “liberal imagination,” to borrow the expression from Stephen Macedo and Bradley and George’s exchange,¹²⁴ and as Tom Grey argued some time ago,¹²⁵ is decidedly *not* the product of “dark forces,” the repression of which makes civilization itself possible. Rather, sex, quintessentially, in the modern liberal imagination, is about as non-Freudian as sex can possibly be: sex, *contra* Freud, is expressive, private, universal, a matter of taste, generative of pleasure, and imposes no or few costs on others. Sexual moralisms that assume to the contrary have imposed irrational and profound harms on vast swaths of the community, and for no sensible reason – as modern or contemporary liberals from Bertrand Russell¹²⁶ to H.L.A. Hart¹²⁷ to Michel Foucault¹²⁸ to David Richards¹²⁹ and to Stephen Macedo¹³⁰

¹²⁴ Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995)

¹²⁵ Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

¹²⁶ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley, trans., Random House, 1990)(1978); MICHEL FOUCAULT, *THE USE OF PLEASURE* (Robert Hurley, trans., Random House, 1990)(1985); MICHEL FOUCAULT, *THE CARE OF THE SELF* (Robert Hurley, trans., 1978).

¹²⁷ See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963) for a defense of restrictions against interference with private actions to counter LORD PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1968), which supported legal sanctions against morally unacceptable actions to preserve society’s morality. The Hart-Devlin debate was spurred by the REPORT OF THE DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957) (known as the Wolfenden Report) recommending homosexual behavior between consenting adults in private should not be a criminal offense.

¹²⁸ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME 1: AN INTRODUCTION*. (Robert Hurley, tr., New York: Random House, 1978); MICHEL FOUCAULT, *THE USE OF PLEASURE: VOLUME 2 OF THE HISTORY OF SEXUALITY*. (Robert Hurley, tr., NY: Random House, 1985); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME 3: THE CARE OF THE SELF* (Robert Hurley, tr., New York: Random House, 1978).

¹²⁹ DAVID A.J. RICHARDS, *WOMEN, GAYS AND THE CONSTITUTION* (University of Chicago Press, 1998).

¹³⁰ Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995).

have all in different ways argued. So long as consensual, there simply are no further conditions for the morality of autonomous sexuality. So, the idea that sex also ought to be mutually desired as well as mutually consensual – not only in the workplace but everywhere – just doesn't enter the picture. Consent is moral condition enough. The harm, then, of unwanted but consensual sex is invisible, or at best made grey, to the sexual libertarian, no less than is the harm of unwanted marital sex to the natural lawyer.

But what of the unwanted pregnancies to which all that autonomous sex leads? If unwanted pregnancy is wrong, and so wrong to be tantamount to *slavery*, then why isn't the heterosexual sex that causes it at least sometimes, and at least partly, *to blame*? Neither Koppelman nor Rubinfeld provide much by way of argument for their refusal to hold sex accountable. They do both suggest, though, albeit for the most part in footnotes and only very briefly, that to "blame the sex" -- to suggest that the sex, and the assumption of the risk of pregnancy the decision to have sex entails -- rather than the laws that criminalize abortion -- for the imposition of unwanted pregnancy (which, again, for both theorists, is tantamount to *slavery*) would be to wrongly suggest, or imply, that sex should be *foregone* where it would risk pregnancy. To blame the sex, rather than laws against abortion, for the unwanted pregnancy which sex occasions, would be in effect, to counsel for sexual abstinence. And *that*, they both say, is unrealistic, undesirable, or both. Sex is, first, just *too good* to be foresworn: to go through life without sex, Koppelman argues in a footnote, is simply unimaginable (although it isn't clear why he jumps to the life-long part). Aside from its goodness, though, it is unrealistic to suggest that sex that might lead to an unwanted pregnancy should be foresworn: sex is inevitable. Sex is the result of forces -- not the dark forces of Freudian imaginings, but *forces* nevertheless. They are quite literally *impossible to control*. Sex is unstoppable. There's no point in blaming the sex. The sex is going to happen regardless.

By virtue of this (I think) somewhat juvenile insistence, both theorists, I imagine unwittingly, thereby underscore radical feminist skepticism about the motivation behind liberal arguments for abortion and birth control generally: that the availability of abortion is attractive to liberal men mostly because it frees women's bodies for male sexual use. Both theorists also give support to the purportedly "false beliefs" of teenage girls referenced above, as those beliefs have been uncovered by social science researchers: that they may as well consent to sex with an aroused partner even if they don't want it because the sex is inevitable in any event. Both Koppelman and Rubinfeld suggest, I suppose inadvertently, that those teenage girls are right: that the sex will indeed "simply happen" -- because of those strong forces we can't control -- if men will it to. The best that the state can do, then, if we take the teenage girls' beliefs on this score to be *true*, is to handle the fallout, which we can do by making abortions safe, legal and available. If we want to do something about the undesirability of the unwanted pregnancies that are the fully predictable consequence of sex that is inevitable (whether or not desired), the thing to do is to legalize, and then constitutionalize, the right to abortion. The rather different idea that we should respond to the specter of unwanted pregnancy by imposing upon the parties who want to have sex but who don't want to conceive, a duty to either use contraception responsibly or not have sex, would unfairly, or

unrealistically, or both, limit the sexual franchise. With abortion made safe, legal and available, there is, apparently, no reason to further condition the morality of heterosexual sex, even if the consequence of all that sex, for some women, in the absence of a right to an abortion, is a lived condition that is tantamount to slavery.

Let me close this section with a thumbnail assessment of the costs and benefits of the sexual libertarian's brief for birth control. Surely social conservatives and natural lawyers are right that the liberal's valorization of autonomous sex which underlies their brief for birth control, and which has so permeated both our legal and popular culture, translates into more and freer sexual expression. And, surely liberals and sexual libertarians are right that more and freer sexual expression adds value immeasurably to many people's lives: same sex couples who wish to marry may do so, unmarried individuals of any gender can have sex and can have children without fear of moral censure, and without visiting any sins on their children's shoulders, and, with the responsible use of birth control, heterosexual individuals and married couples both can enjoy sexual expression without fear of unwanted reproductive consequences. The libertarian's valorizing claim that supports the distribution of birth control also means, though, that there is more unwanted sex in the world than there might be otherwise. That should count as a cost of the argument, whether or not a cost of birth control, and it is a cost entirely unacknowledged by libertarians themselves. And finally, the celebration of autonomous sex that underlies the case for birth control, where birth control is not used or is misused, either from moral conviction, ignorance, or recklessness, also, then, contributes to the sufferance of unwanted pregnancies. Yet as argued above, the libertarian brief for birth control falls far short of an endorsement of an argument for a duty – rather than simply a right -- to use it. Even assuming that birth control brings down the number of unwanted pregnancies, then, the *brief* for the availability of birth control implied by the valorizing claim, may perversely increase the number of unwanted pregnancies over what it might have been without that valorizing claim. All of that unwanted sex and all of those unwanted pregnancies impose harms, and they are harms which liberals and sexual libertarians ought to at least acknowledge, and ought to try to counter.

The libertarian brief for birth control, and particularly its valorizing claim, once we account for those harms, is a decidedly mixed blessing. Obviously, birth control itself brings down the overall number of unwanted pregnancies from what it would be in a world in which the valorizing claim regarding sex had taken hold but without the technologies of reliable birth control. What's not so clear is whether it brings that overall number down below what it would be in a world in which the technologies are available and the valorizing claim had *not* taken hold. But whatever one might think of any of that, birth control itself surely doesn't bring down the overall number to the degree it would, were its use argued as a *duty*, and not just a *right*, by its most ardent defenders. And, obviously, birth control itself doesn't ameliorate at all the harms of the unwanted sex that the sexual libertarian's conception of sexual morality valorizes. Particularly when combined with the ideological and dogmatically valorizing conception of the value of autonomous sex that has fueled its availability, birth control might in fact worsen those harms.

The libertarian brief for birth control, no less than the natural lawyer's brief against it, is premised on a conception of heterosexual morality that runs roughshod over women's desires and women's pleasures both: the natural law conception does so by valorizing marital sex and the unwanted pregnancies it causes, and the libertarian's does so by valorizing autonomous sex, whether or not unwanted, and whether or not pleasurable, and by refusing to condition the morality of even wanted and pleasurable autonomous sex on the responsible use of birth control. Both natural lawyers and libertarians, in brief, valorize either pregnancies, or sex, or both, regardless of women's desire or lack of desire.

Does this matter? The celebration of unwanted but autonomous or marital sex, as well as unwanted but intentional pregnancy, may be unfortunate, if all of that unwanted sex and all of those unwanted pregnancies are themselves harms, whether those harms are best characterized as political, economic, or emotional. But those harms cannot in any obvious way ground lawsuits or crimes, beyond the degree to which the harms from unwanted sex in the workplace might translate into financial loss, which may sometimes be partially recoverable in sexual harassment lawsuits, or, perhaps, the harms from unwanted pregnancies might translate into financial loss that could at least theoretically be recoverable in the sorts of claims which Shari Motro envisions. Nevertheless, those harms, including the psychic and political harms occasioned by both unwanted sex and unwanted pregnancy, should be acknowledged and minimized. Instead, they are multiplying, so to speak, on our watch. And, they are brought on or intensified by one or the other of two conceptions of heterosexual morality to which almost all of us have more or less signed on, at least in the legal academy. The end of the conclusion that follows comments briefly on how we might ameliorate the damage we've wrought.

Conclusion

Let me recapitulate. Our contemporary legal and constitutional struggles over birth control have bizarrely rendered invisible the competing conceptions of heterosexual morality that frame at least some of the arguments for or against its legality and accessibility. Those conceptions, however, as well as the arguments regarding birth control that presuppose them, stand in need of critique. The natural lawyer's claim that birth control is immoral rests (in part) on a conception of heterosexual morality that unqualifiedly celebrates both procreative marital sex, and the pregnancies that sex causes, as intrinsic goods, regardless of whether they are wanted, while the libertarian claim that birth control is of great instrumental value -- so great that its use should be constitutionally protected and its availability guaranteed -- rests on a conception of heterosexual morality that celebrates autonomous sex, and again regardless of the presence or absence of desire. These two views of course entail starkly opposing conclusions about the value of birth control: for the natural lawyer, birth control frustrates the natural good of procreative marital sex, and therefore should be banned or discouraged (and certainly should not be supplied by employers), and for the libertarian, birth control instrumentally frees the natural good of autonomous sex from the constraints of

both reproduction and fears of it, and therefore should be made widely available. But that stark contrast and the bitter debate it has engendered masks an awful lot of shared ground, and a whole lot more than either side recognizes. To put it crudely, both the natural lawyer and the libertarian's arguments regarding birth control are premised on conceptions of sex that are (at least in part) profoundly "pro-sex:" the first is pro-"sex of the reproductive form," and the second is pro-"autonomous sex." The first views birth control as antithetical to the sex it valorizes, the second views birth control as instrumentally necessary for it. But both views rest on the valorization or celebration of a large swath of sexual behavior.

And, both conceptions, as well as the arguments for or against birth control they respectively imply, are problematic for just that reason: not because of what they censor, but because of what they dogmatically celebrate. Neither marital sex on the one hand, nor autonomous sex on the other, are unalloyed, unconditional, natural or intrinsic human goods. For either marital or autonomous sex to be *good* (as well as pleasurable), both the sex and the pregnancies that may follow must be not only mutually consensual but also mutually *wanted*. The celebration of what is often assaultive and aggressive, but minimally unwelcome, behavior by both camps pulls within their respective tents of moral approbation an awful lot of unwanted sex and a lot of unwanted pregnancies, and all of their attendant harms. That the argument over birth control has shielded all of this from critical scrutiny is itself a cost of the way we – meaning lawyers -- have framed that conflict.

Neither the "reproductive form" nor "consent" is a sufficient condition for the morality of sex. Neither marriage nor the "marital form" of the sex that occurs within it guarantees that sex is mutually desired. But *consent* doesn't guarantee desire either: the current liberal and liberal feminist campaigns to clarify the consent standard with "yes means yes" and "no means no" rules of construction, for example, don't in any way imply that the sex to which a fully verbal and unequivocal yes is given, is actually *wanted*. In fact, one cost (there may be others) of the focus on "yes means yes" in our current conversations about rape is simply that it obscures this fact: the problem many women, and particularly young women, face with respect to sexuality, is not that a man understands her passive acquiescence to sex as a yes while she understands it as a no, but rather, that she say "yes" so frequently – passively and actively both -- to sex that she does not truly desire and does not want and from which she will take no pleasure. *That* problem is hardly clarified, and in fact it is obscured – and badly -- by "yes means yes" and "no means no" campaigns. Likewise, though, abstinence-only campaigns, pushed aggressively whether or not successfully by moral conservatives as the best way to deal with social problems attendant to sex outside of marriage, don't in any way guarantee that the sex *inside* traditional marriages of the approved and celebrated reproductive form is also wanted. And, in fact, they obfuscate that problem, and for exactly the same reason: that a woman abstains from premarital sex doesn't mean that she wants particular sexual acts that occur within her marriage. The same is true of women's desires, pleasures, and interests with respect to pregnancy: pregnancies that result from either autonomous or marital sex can be *unwanted*, and when they are, they are harmful. Yet, women's sexual and reproductive desires, women's sexual and reproductive pleasures, and to a stunning degree women's

sexual and reproductive interests, are simply irrelevant to the two conceptions of the morality of heterosexual sex that continue to define the poles of our cultural-sexual debates around birth control.

There is now little doubt that marriage does indeed make us happier, richer, healthier, and more long-lived, and it makes our children's lives happier, richer, healthier and more long-lived as well, as the institution of marriage's defenders and celebrants have long insisted.¹³¹ Social conservatives have largely won the argument for the social utility of marriage, as the equal rights campaign for same-sex marriage indirectly and perhaps to some degree unintentionally underscores. There is also now little doubt that the liberal's censorial claim regarding the necessity of consent to moral sex is a major advance for liberalism and women both. Non-consensual sex is indeed always wrong (whether or not it is also always rape), and it is wrong whether or not the victim was a sex worker, whether or not she actively resisted, whether or not there was force employed, whether or not the parties were on a date, and whether or not they were married. Liberals have won that argument, and we're all -- but particularly women -- the better off for it. Nevertheless, neither consent nor marriage is sufficient to guarantee that sex is truly *moral*, no matter how consensual or how marital the sex. All sex, as well all the pregnancies all that sex sometimes causes, should be mutually wanted. When it is not mutually desired, it is harmful, and when both parties know that it is not desired by one or the other of them, it is immoral. A woman's desire is a necessary condition for the morality of the sex in which she engages, as well as for the morality of the pregnancy and maternity that may result. Neither marriage *nor* consent suffices.

The harms caused by deeply entrenched beliefs to the contrary should be addressed. The natural lawyer's conception of heterosexual morality -- the blanket valorization of all uncontracepted penetrative sex within marriage -- also implicitly valorizes unwanted sex and quite explicitly valorizes the unwanted pregnancies that such sex (whether wanted or unwanted) may cause. To the extent that women live their sexual married lives on the basis of that belief, all of that uncontracepted marital sex presumably causes quite a few unwanted pregnancies. The libertarian's conception of heterosexual morality -- the blanket valorization of all autonomous heterosexual sex within or outside of marriage and the instrumental value attached to birth control accordingly -- also valorizes *unwanted* autonomous sex as well. To the extent that women live their sexual lives on the basis of that liberal belief, all of that autonomous sex, when unwanted, carries unreckoned harms in its wake. Taking these harms seriously would require taking women's desires seriously as a moral condition of sex and reproduction both, whether inside marriage, with respect to the natural law conception, or outside of it, as per the liberal. That might be hard to do, in part, for the straightforwardly sexist reason that it is women more often than not who bear the brunt of those harms. To counter them requires us to reverse the course of millennia, and center rather than marginalize not just harms borne peculiarly by women, but also women's desires, including, most concretely,

¹³¹ For a full discussion, see ROBIN WEST, *MARRIAGE, SEX AND GENDER* (Boulder: Paradigm Publishers 2007).

women's *lack* of desire, when they lack it, for heterosexual penetrative sex and for pregnancy both.

It *shouldn't* be so hard to do, though, either within a socially conservative milieu that honors the dignity and the sanctity of both women's and men's bodies, or in a liberal regime that honors their free will. The natural lawyer's insistence on the intrinsic moral value of heterosexual sex of the reproductive form could easily be amended to accommodate this simple moral fact: whatever one might think of the *necessity* of the reproductive form to moral sex and to the pregnancies that result – leave that for another day – marriage and whatever “marital form” for sex one might wish to specify are clearly not *sufficient* conditions for the morality of marital sex. Mutual desire is a necessary condition of the morality of marital sex *and* of the pregnancies to which that sex sometimes leads. A woman's or a man's lack of desire for sex should be accorded moral veto power over the couple's decision to have sex, so as to minimize unwanted sex, and, ideally, birth control should be used responsibly to minimize unwanted pregnancy. Even in a traditional relationship in which the use of birth control (other than natural) is off the table on moral grounds, however, the *recognition* of such a constraint would go some ways toward reducing both the amount of unwanted sex and the number of unwanted pregnancies within traditional marriages. A woman in an otherwise completely traditional marriage who only has sex when she affirmatively desires it, *and who*, during the periods in which she believes herself to be fertile, only when and if she *also* actively desires a pregnancy (rather than when she is open to a risk), will have less unwanted sex and fewer unwanted pregnancies simply by *acting* on those desires, and by insisting her partner does likewise.

Just as clearly, the libertarian's valorization of autonomous sex stands in need of amendment: mutual desire, and not just consensuality, is a necessary moral condition of both sex and the pregnancies that can result. Libertarians are surely correct to believe that the morality of consensual sex does not depend upon the marital status, or the gender, or the sexual orientation, much less the race or class of the parties engaging in it. But it does depend on mutual desire. A woman or girl who has consensual sex only when she feels a desire for it will have less unwanted sex and suffer fewer of its attendant harms than a woman or girl who does not do so. Likewise, a woman or girl who feels herself and her partner to be under a moral duty to use contraception when she wants the sex but not the pregnancy that may result, and has uncontracepted sex only when she affirmatively desires a pregnancy, will suffer far fewer unwanted pregnancies. The woman or girl should act on those desires, and insist her partner do so as well, inside as well as outside of marriage, and no matter how a marriage is defined. Those are the behaviors we should be actively encouraging, both for our children and for ourselves: you don't just have a right to birth control under the Constitution, or a right to its availability under the ACA. You also have a moral duty to use it, or to abstain from sex if you do not want to become pregnant. And whether or not you're using birth control, you have a moral duty to your present and future self not to have sex when you don't want to, and not to impose it on an unwanting – even if consenting -- partner. And, ought does indeed imply can: sex in point of fact is not inevitable, even when hotly desired.

With that straightforward change in consciousness – that amendment to our liberal embrace of the positive value of autonomous sex -- we'd all be better off.